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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition Of WAIKOLOA MAUKA, LLC To Amend the Agricultural Land Use District Boundary Into the Rural Land Use District for Approximately 731.581 Acres in South Kohala District, Island of Hawaii, Tax Map Key No. (3) 6-8-02:016 (por.)	DOCKET NO. A06-767 WAIKOLOA HIGHLANDS, INC.'S SECOND SUPPLEMENTAL STATEMENT OF POSITION ON ORDER TO SHOW CAUSE AND MEMORANDUM OF LAW; EXHIBITS "45" – "64"; DECLARATION OF DEREK B. SIMON; CERTIFICATE OF SERVICE

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I. INTRODUCTION

Pursuant to Hawai'i Administrative Rules ("**HAR**") § 15-15-55 and Chair Jonathan Likeke Scheuer's oral directive at the State of Hawai'i ("**State**") Land Use Commission's (the "**Commission**") October 25, 2018 hearing on the Order to Show Cause, filed July 3, 2018 (the "**OSC**"), Waikoloa Highlands, Inc. ("**WHI**"), as successor-in-interest to Petitioner Waikoloa Mauka, LLC ("**WML**") to that certain parcel of land consisting of approximately 731.581 acres and currently identified by Tax Map Key ("**TMK**") No. (3) 6-8-002: 016 (the "**Petition Area**"), by and through its legal counsel, Carlsmith Ball LLP, hereby respectfully submits this Second Supplemental Statement of Position on Order to Show Cause and Memorandum of Law. Continued proceedings on the OSC are presently set to resume on November 28, 2018.

After holding two days of hearings on the OSC, Chair Scheuer directed the Parties to provide supplemental briefing on a number of legal issues central to the Commission's resolution of the OSC. As explained in greater detail *infra*, these issues include: (1) what constitutes "substantial commencement" under the Hawai'i Supreme Court's seminal decision in *DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC.*, 134 Hawai'i 187, 339 P.3d 685 (2014) ("***Aina Lea***"); (2) what legal standard is to be applied in the event that the Commission does not find substantial commencement; (3) whether documents demonstrating WHI's satisfaction of its affordable housing obligations under Condition No. 9 of the Commission's Findings of Fact, Conclusions of Law, and Decision and Order in Docket No. A06-767, filed on June 10, 2008 ("**D&O**"),[1] are relevant to the question of substantial commencement; (4) whether WHI's allegations of fraud,

[1] The reclassification was sought to allow for the development of a 398-lot rural-residential development (the "**Project**").

gross mismanagement, and breaches of fiduciary duties by the former officer of WML and WHI (Stefan Martirosian) are relevant to these OSC proceedings; (5) the process forward for the Project in the event that the Commission (a) orders a reversion, or (b) does not order a reversion; and (6) the applicability of *Aina Le'a* to this case in light of D&O Conditions Nos. 2 and 3. *See* **Exhibit 45** (Oct. 25, 2018 Hr. Tr.) at 102:11-108:3, attached hereto. ***The timing and substance of the requested briefing is extremely concerning***.

WHI respectfully renews its request that the Commission defer any further action on the OSC under the framework set forth in the Joint Stipulation to Continue Hearing on Order to Show Cause previously presented to the Commission, as written (the "**Proposed Stipulation**"), *see* Exhibit 18, or under other conditions satisfactory to the Commission. For the following reasons, a deferral under the Proposed Stipulation (or similar conditions) is the most appropriate and prudent exercise of the Commission's discretion and discharge of its duties under the law.

First, WHI's ongoing good-faith efforts to get the Project back into compliance with the D&O weigh heavily in favor of a deferral being the most appropriate course of action. The Project was delayed by the numerous misdeeds of WHI's former director and officer, Stefan Martirosian, but its new development team has made meaningful progress since being formed. WHI is also working on the voluntary provision of affordable housing opportunities in the Waikoloa Area over and above its obligations under the D&O. Collectively, these efforts demonstrate that WHI is competent and committed to completing the Project if given an opportunity to do so, and the Proposed Stipulation provides this opportunity without risk of prejudice to the Parties.

Second, in the 28 years since Hawai'i Revised Statute ("**HRS**") § 205-4(g) was enacted

and the four years since *Aina Le'a* was decided, the Commission has failed to fulfill its statutory duty to promulgate a rule defining or, at least providing some guidance on, the standard for determining whether there has been substantial commencement. The Commission's failure to promulgate such a rule is especially egregious given the Hawai'i Supreme Court's decision in *Aina Le'a*, which invalidated a reversion ordered by the Commission based largely on the ambiguity of and lack of clarity on that very statutory standard.

Third, the requested briefing strongly suggests that the Commission does not have a firm understanding of the standards for determining the existence of substantial commencement and good cause, and that it is attempting to establish these standards through these proceedings. That, however, constitutes impermissible rule-making in violation of HRS Chapter 91. The standard for substantial commencement plainly falls within the definition of a "rule" under HRS Chapter 91; the Commission's ongoing efforts to promulgate a rule that includes a definition of "substantial commencement" confirms this. Any standard or rule established through these proceedings will be invalid, ***as a matter of law***.

Fourth, because there is no clear standard for demonstrating substantial commencement, ordering a reversion under these circumstances runs an extreme risk of the Commission acting arbitrarily and capriciously in violation of WHI's right to ***substantive*** due process under the United States and Hawai'i Constitutions. This is particularly true given that the Commission has ***already held two days of hearings*** on the OSC with an apparent uncertainty as to the standards it is to apply.

Moreover, the absence of known, controlling standards deprives WHI of its right to be heard at a meaningful time and in a meaningful manner in violation of its right to ***procedural*** due

process. WHI has absolutely no notice of the standards it must meet. If the Commission is uncertain of what standards it is to apply, WHI cannot adduce evidence tailored to the standards being applied and the Commission cannot, in turn, fairly evaluate WHI's evidence in light of the applicable standards. Simply put, the Commission has put the cart before the horse.

Fifth, a reversion under these circumstances would violate WHI's right to equal protection of the law. To WHI's knowledge, *Aina Le'a* is the only time the Commission has ordered a reversion over the objection of a landowner. This is, in part, because the Commission has a long-standing practice of providing petitioners at least one opportunity (but often many more) to get their projects back on track. ***This is all that WHI is asking for.***

If the Commission is unwilling to do so here, that decision must be supported by a legitimate reason in the record. WHI's review of the record reveals no such reason. Instead, WHI has gone to great lengths to correct course and provide every conceivable assurance to the Commission that it is ready, willing, and able to timely proceed with the Project.

Finally, even if the Commission remains unwilling to defer action on the OSC, a reversion should not be ordered. Under the legal principles discussed herein, as applied to the particular facts and circumstance of this case, a reversion is not warranted because WHI has substantially commenced its use of the land. The entitlements history of this Project, including having received its RA-1a County of Hawai'i ("**County**") zoning almost 30 years ago, WHI's actions in pursuit of other development approvals, and WHI's concrete actions in furtherance of the Project and in satisfaction of the D&O demonstrates that this Project is ***different in kind*** from other projects reviewed by the Commission in OSC proceedings and that WHI has substantially commenced its use of the land. Moreover, even assuming *arguendo* that the Commission does

not find substantial commencement, good cause exists to maintain the Petition Area's present State Land Use ("**SLU**") Rural District classification.

II. DEFERRAL OF ACTION ON THE OSC IS THE MOST APPROPRIATE EXERCISE OF THE COMMISSION'S AUTHORITY AND DISCRETION

WHI respectfully renews its request for the Commission to defer action on the OSC under the Proposed Stipulation, as written, or other conditions satisfactory to the Commission. *See* Exhibit 18. As Commissioner Gary Y. Okuda observed, in the minds of many, a reversion is tantamount to a "***death penalty***" for a project. *See* Exhibit 45 at 50:21-22. The circumstances here do not warrant or justify the imposition of that extreme measure.

A. WHI'S ONGOING EFFORTS FAVOR DEFERRAL

WHI's ongoing efforts towards development of the Project militate strongly in favor of a deferral being the most appropriate course of action for the Commission. WHI's work on the Project was delayed due to the gross mismanagement by its former Director, Mr. Martirosian, but the new development team has made significant progress on moving the Project forward over the past 5-to-6 months. These good faith efforts include, without limitation, reconnecting with the Project engineers and other consultants to update the Project plans and construction costs, conducting additional archaeological work to meet the applicable requirements under the D&O, meeting with a PUC-regulated private water company on water service to the Project, obtaining a commitment letter for financing of the Project construction, and researching the current market conditions to determine the appropriate real estate product and pricing for the Project.

In addition, notwithstanding WHI's complete satisfaction of D&O Condition No. 9 and Condition E of County Rezoning Ordinance No. 13-29 , WHI is currently in discussions with Ikaika Ohana, an affordable housing developer qualified as an Internal Revenue Service ("**IRS**")

501(c)(3) non-profit entity, to voluntarily provide additional land to support affordable housing in Waikoloa. *See* **Exhibit 59a** (WHI's Nov. 16, 2018 Proposal re Affordable Housing) & **Exhibit 59b** (Ikaika Ohana's Nov. 19, 2018 Response to WHI's Proposal re Affordable Housing), attached hereto. A map showing the potential additional land to be provided by WHI is attached hereto as **Exhibit 60**. Any Agreement between WHI and Ikaika Ohana would be subject to the approval of the County Office of Housing and Community Development ("**OHCD**"). An immediate reversion, however, would likely bring these discussions to a halt.

B. A REVERSION AT THIS TIME WILL VIOLATE THE LAW AND WHI'S RIGHTS

The Commission's uncertainty on the standard for determining whether WHI has shown "substantial commencement of use of the land" also weighs heavily in favor of deferring action on the OSC. Chair Scheuer's request for supplemental briefing strongly suggests that the Commission is struggling to develop and understand the standards it will use to resolve the OSC. That is troubling, because the Commission should have determined (and published) the applicable standards before it proceeded with the OSC. If the Commission resolves the OSC using undefined, newly-crafted standards, it runs the risk of violating the plain language of HRS Chapter 205, engaging in impermissible rulemaking in violation of HRS Chapter 91, and depriving WHI of its right to substantive due process and equal protection under the United States and Hawai'i Constitutions.

1. Violation of HRS Chapter 205

The Commission has already violated the plain language of HRS Chapter 205 by failing to promulgate administrative rules under HRS Chapter 91 to implement the provisions of HRS Chapter 205-4(g). HRS Chapter 205-7 provides that "the land use commission ***shall adopt***,

amend, or repeal rules relating to matters within its jurisdiction in the manner prescribed in chapter 91." (Emphases added). The statute's language is clear and mandatory. Nevertheless, the Commission has not promulgated rules pursuant to HRS Chapter 91 for HRS Chapter 205-4(g) OSC proceedings. The Commission's failure to promulgate rules providing guidance on what constitutes "substantial commencement" is especially egregious given the Hawai'i Supreme Court's decision in *Aina Le'a*, which invalidated a reversion ordered by the Commission based largely on the ambiguity of and lack of clarity on that very statutory standard.

Tanaka v. State, Department of Land & Natural Resources, 117 Hawai'i 16, 26, 175 P.3d 126, 136 (App. 2007) is instructive. In *Tanaka*, the Department of Land and Natural Resources ("**DLNR**") implemented fees on hunting licenses without first developing those fees through the HRS Chapter 91 rulemaking process. The DLNR argued that its fees were authorized by statute, and therefore permissible. The Hawai'i Intermediate Court of Appeals ("**ICA**") disagreed, holding that the DLNR was ***expressly required by statute*** to implement its fees through rulemaking under HRS Chapter 91. In overturning the DLNR's fees, the court held that the "DLNR was not allowed to sidestep the rulemaking procedures set forth in HRS chapter 91[.]" *Id.* at 26, 175 P.3d at 136.

As the ICA held in *Tanaka*, "[r]ules are necessary to ***ensure fairness*** and to ***minimize unbridled use of discretion*** of an agency." *Id.*, 175 P.3d at 136 (emphasis added) (quoting *Aluli v. Lewin*, 73 Haw. 56, 62, 828 P.2d 802, 805 (1992)). HRS 205-7, like the statute at issue in *Tanaka*, requires the Commission to first promulgate rules under HRS Chapter 91 before it may exercise its statutory authority to conduct OSC hearings. It has been ***28 years*** since subsection (g) was added to HRS § 205-4, and the Commission has still failed to do so. *See* 990 Hawai'i

Laws ACT 261. The Commission should defer resolution of the OSC until it complies with its statutory obligations.

2. Proceeding at this Point Will Result in the Commission Engaging in Impermissible Rulemaking in Violation of HRS Chapter 91

Although the Commission must develop rules to implement HRS § 205-4(g), the current effort by the Commission to both take action on this OSC and simultaneously develop its standards ***through*** these proceedings would constitute impermissible rulemaking. HRS § 91-1 defines a "Rule," in relevant part, as an "agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy[.]" The Commission's standard for what constitutes "substantial commencement" will indisputably be a "rule" – it will be an interpretation of law (HRS § 205-4(g)) with both general applicability and future effect, and will affect not only WHI's particular rights in the instant proceedings, but also the rights of the public and petitioners in all future OSC proceedings initiated under HRS § 205-4(g). The standard for "substantial commencement" is not the type of rule that can be developed on an ad-hoc basis, as it does not involve an unanticipated legal situation or involve inherently subjective factors that defy rigid classification. Instead, that standard must be developed through the formal rulemaking procedures of HRS Chapter 91. The Commission has already admitted as much; it is ***in the process*** of drafting administrative rules on "substantial commencement" ***under HRS Chapter 91***.

Because the Commission is required to develop the standard for "substantial commencement" through the procedures of HRS Chapter 91, it ***cannot*** develop that standard during these proceedings, using its own "unwritten" methodologies and subjective interpretations of statutory standards. For example, in *Hawaii Prince Hotel Waikiki Corp. v. City & Cnty. of*

Honolulu, 89 Hawai'i 381, 974 P.2d 21 (1999), the Hawai'i Supreme Court struck down the City and County of Honolulu, Department of Finance's ("**DOF**") methodology for determining "imparted" property value, where the DOF official admitted that the methodology was based on his mere personal "interpretation" of the relevant regulatory factors. *Id.* at 392-93, 974 P.2d 32-33. The Hawai'i Supreme Court made clear that administrative rules developed by an agency are invalid unless promulgated in strict compliance with HRS Chapter 91:

> ***The City must therefore follow the HAPA rulemaking procedures set forth in HRS § 91–3 prior to applying imparted value deductions toward golf course assessments.*** Otherwise, ***the affected public cannot fairly anticipate or address the procedure as there is no specific provision in the statute or regulations which describe[s] the determination process***. The public and interested parties are ***without any firm knowledge of the factors that the agency would deem relevant and influential in its ultimate decision***. The public has been afforded no meaningful opportunity to shape these criteria that affect their interest.

Id. at 393, 974 P.2d 33 (emphases added) (internal formatting omitted).

The Commission is currently on course to engage in the type of impermissible rulemaking prohibited by *Hawaii Prince Hotel Waikiki Corp.* As evidenced by its request for supplemental briefing, the Commission is trying to develop the rule or standard for what constitutes "substantial commencement" ***during*** the instant OSC proceedings, without complying with the notice and hearing procedures mandated by HRS Chapter 91. Whatever rule the Commission arrives at in these proceedings will be nothing more than a subjective interpretation of the ambiguous statutory language in HRS § 205-4(g), developed without input from the public and all interested parties. That rule will be invalid, ***as a matter of law***. To ensure that the Commission's rule for "substantial commencement" complies with HRS Chapter 91 and Hawai'i Supreme Court precedent, the Commission should defer any further action until it completes its administrative rulemaking process and, in the meantime, provide WHI an

opportunity to proceed with the Project in good faith.

3. A Reversion Will Violate WHI's Right to Due Process

In *Aina Le'a*, the Hawai'i Supreme Court explained that "[d]ue process includes a ***substantive*** component that guards against ***arbitrary and capricious*** government action[.]" *Aina Le'a*, 134 Hawai'i at 219, 339 P.3d at 717 (emphasis added) (citing *In re Applications of Herrick*, 82 Hawai'i 329, 349, 922 P.2d 942, 962 (1996)). To establish a violation of ***substantive*** due process, "an aggrieved person must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.*, 339 P.3d at 717 (citing *Lopez v. State*, 133 Hawai'i 311, 322, 328 P.3d 320, 331 (2014)). Similarly, ***procedural*** due process affords all persons the right to "notice and an opportunity to be heard at a meaningful time and ***in a meaningful manner***." *Mauna Kea Anaina Hou v. Board of Land & Nat. Res.*, 136 Hawai'i 376, 389, 363 P.3d 224, 237 (2015) (emphases added).

Any ruling by the Commission at this juncture would be a serious violation of WHI's substantive and procedural due process rights. As discussed above, the Commission failed to promulgate necessary rules to implement HRS § 205-4(g) before commencing these proceedings, and the Commission cannot engage in impermissible rulemaking to make those rules during these proceedings. In short, the Commission put the cart before horse, by initiating a proceeding in which the Commission does not have a clear understanding of the controlling legal standards. Any ruling by the Commission would be arbitrary and capricious, because that ruling would be based solely on the Commission's subjective and shifting interpretation of the standard for "substantial commencement," rather than on the application of valid standards to the facts of this case. At the same time, WHI would be deprived of its right to meaningful notice and a

meaningful opportunity to be heard; WHI is facing the "death penalty" for its property interest, but WHI was given no notice of the standards the Commission will use to determine that sentence, and WHI was not given a chance to present evidence tailored to the controlling standards.

The timing of the Commission's request for supplemental briefing is particularly concerning. The Commission has already held ***two hearings*** on the OSC ***before*** requesting this supplemental briefing, yet the requested briefing strongly suggests that the Commission did so without a firm understanding of, *inter alia*, what constitutes "substantial commencement" and "good cause" under HRS § 205-4(g) and *Aina Le'a*. It is not clear how the Commission could have fairly evaluated WHI's evidence without a firm understanding of the central legal standards it is supposed to apply to that evidence. What is clear is that WHI was not given a meaningful opportunity at those hearings to adduce evidence tailored to the standards the Commission will apply.

WHI's due process concerns are also highlighted by the Commission's waffling on the standard for "substantial commencement" in its proposed addition of a new subsection (e) to HAR § 15-15-93 (the "**Proposed Amendment**"). Initially, the Proposed Amendment read as follows:

> Absent ***substantial commencement of <u>construction</u>***, the commission may revert the property to its former land use classification or a more appropriate classification. For the purposes of this subsection (e) substantial commencement shall be determined based on the circumstances or facts presented in the order to show cause regardless of dollar amount expended or percentage of work completed.

See **<u>Exhibit 46</u>** (emphases added), attached hereto. However, after holding an initial round of public hearings and receiving public comment, including comments in strong opposition from

WHI, *see generally* Exhibit 21, the Commission revised the Proposed Amendment to remove the word "construction" and replace it with "use of the land." *See* **Exhibit 47**, attached hereto. This is a significant revision; the meanings of "use of the land" and "construction" are drastically different in the development context. *See* Exhibit 21 at 2-3. The Commission's shifting iterations of the standard for "substantial commencement" raises the fundamental questions of which version WHI is supposed to address, which version the Commission will apply, and whether the Commission will come up with some new standard before these proceedings are concluded.

Even the current form of the Proposed Amendment (which cannot constitute the controlling standard in these proceedings) does not provide the Commission or WHI with any meaningful guidance. The Proposed Amendment simply paraphrases a portion of the Hawaii Supreme Court's in *Aina Le*'a. It does not provide any factors to weigh, criteria to asses, or milestones to meet. *See* Exhibit 47. There is simply no comprehensible standard for either the Commission or the parties before it to rely on.

WHI should not be forced to try to meet an undefined objective, or aim at a moving target. And, conversely, the Commission should not take action, particularly action as extreme as the "death penalty" of a reversion, without a firm understanding of the standards to be applied.

Chair Scheuer declared that WHI's "[P]roject has clearly . . . been kapulu[2] from the start, and [that he has] no intention to have th[ese] hearing[s] proceed in a sloppy manner." *See* Exhibit 45 at 110:22-25. However, that result was preordained by the lack of any rules

[2] According to Chair Scheuer, "Kapulu" means "sloppy, and it's a very negative thing. Like if you're doing something and auntie says: You know what, that's kapulu. That is a shame thing to have." Exhibit 45 at 110:18-21.

governing OSC proceedings, and will be difficult to avoid moving forward if the Commission takes action on the OSC without any valid and known legal standards to apply.[3] Due process demands that the Commission defer any further action on the OSC until it is able to develop administrative rules for OSC proceedings that both provide fair notice to WHI of the same and reduce the clear risk of the Commission taking action that is arbitrary and capricious.

4. A Reversion Will Violate WHI's Right to Equal Protection

Ordering a reversion under these circumstances would also violate WHI's right to equal protection of the law under the United States and Hawai'i Constitutions. "In general, the equal protection clauses of the United States and Hawai'i Constitutions 'mandate[ ] that all persons similarly situated shall be treated alike, both in privileges conferred and in the liabilities imposed.'" *Aina Le'a*, 134 Hawai'i at 219, 339 P.3d at 717–18 (citation omitted).

The United States Supreme Court has "recognized that an equal protection claim may be brought by a 'class of one,' 'where the plaintiff alleges that [he/she] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Id.* at 219–20, 339 P.3d at 717–18 (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000)). The Court has also "explained that '[t]he purpose of the equal protection clause . . . is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 1074–75, 145 L.Ed.2d 1060 (2000)

[3] An example of the lack of rules on OSC proceedings was shown during the Commission's October 25, 2018 hearing when Chair Scheuer resisted WHI's request to examine a representative of the State of Hawai'i Office of Planning ("**OP**") on the grounds that WHI had not listed that witness on a Witness List. WHI's counsel responded that the cross-examination should be allowed as there are no administrative rules governing OSC proceedings, and thus a Witness List is not required. *See* Exhibit 45 at 98:4-101:2; *id.* at 108:15-110:16.

(citations omitted).[4]

As far as WHI is aware, there are only three instances (Docket Nos. A05-755 (Hale Mua Properties, LLC), A92-680 (Brewer Properties, Inc.), and A87-617 (Bridge Aina Le'a, LLC)) where the Commission has ordered a reversion. The petitioners in both the Hale Mua and Brewer Properties Dockets voluntarily allowed the Commission to revert their respective petition areas back to their former SLU District classifications. *See* **Exhibit 48a** & **Exhibit 48b** (select materials from Docket No. A05-755), attached hereto; **Exhibit 49a** & **Exhibit 49b** (select materials from Docket No. A92-680), attached hereto. WHI understands that the successor petitioner of Docket A06-770 (The Shopoff Group, L.P.) has also decided to voluntarily request the Commission to revert its petition area.[5] *See* **Exhibit 50a** through **Exhibit 50c** (select materials from Docket No. A06-770), attached hereto. Thus, as of today, *Aina Lea* is the only involuntary reversion ordered by the Commission over the objection of the landowner.

WHI is also acutely aware of the Commission's long-standing practice of providing petitioners with additional opportunities to come into compliance with their respective D&Os without immediately resorting to the "death penalty" of a reversion (hence, the absence of ***any*** involuntary reversions other than *Aina Le'a*). ***This is all that WHI is ultimately asking for.***

The Commission's treatment of the successor petitioners in Docket A92-683 (Halekua Development Corporation ("**Halekua**")) is illustrative of this practice. In Halekua, the

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[4] In *Olech*, the plaintiff alleged that a municipality "intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners." *Olech*, 528 U.S. at 565, 120 S.Ct. at 1075. The plaintiff further alleged "that the Village's demand was 'irrational and wholly arbitrary[.]'" The Court held that "[t]hese allegations, quite apart from the [municipality]'s subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis." *Id.*, 120 S.Ct. at 1075.

[5] The order to show cause hearing on the Shopoff Group Docket is scheduled for the same day as Petitioner's continued hearing on these OSC proceedings on November 28, 2018.

Commission reclassified approximately 503.886 acres of land (the "**Halekua Petition Area**") from the SLU Agricultural District to the SLU Urban District in October 1996 to allow for the development of the second phase of the Royal Kunia Project ("**Royal Kunia Phase II**"). *See* **Exhibit 51a** (Amended Findings of Fact, Conclusions of Law, and Decision and Order in Docket No. A92-683 ("**Halekua D&O**")) at 64, attached hereto. The proposed Royal Kunia Phase II project included the development of approximately 2,000 single-family and multi-family residences, 123 acres of light-industrial uses, a public park, and a school site. A 150-acre agricultural park ("**Agricultural Park**") was also part of the planned development. *See* id. at 8.

Pursuant to the conditions imposed under the Halekua D&O, Halekua was required to, *inter alia*, convey and provide off-site infrastructure to the Agricultural Park to the State by December 31, 1999. Halekua was also required to convey 12 acres of land to the State for an elementary school, contribute $500,000 for a road to the school site, and develop other infrastructure up to the school site ("**School Site Commitment**").

On October 15, 2002, unfulfilled obligations under the D&O, including Halekua's failure to secure financing for Royal Kunia Phase II and to convey the Agricultural Park to the State, led OP to file a motion for an OSC ("**OP Motion**") to rescind the Halekua D&O and revert the entire Halekua Petition Area to its former SLU Agricultural District designation. *See* **Exhibit 51b** (Order Granting OP's Motion for an OSC, dated Feb. 20, 2003), attached hereto. The OP Motion was filed almost ***three years after*** the Agricultural Park was required to be conveyed to the State and with no on-the-ground development activities having taken place.[6]

[6] According to Halekua's 2016 Annual Report, approximately ***twenty years after*** the initial reclassification, Halekua had only met a handful of the conditions set forth in the Halekua D&O. According to 2016 Annual Report, Halekua had only fully satisfied Condition 18 (development plan approvals), Condition 21 (recording of statement regarding property subject to conditions), and Condition 25 (recording of conditions). *See* **Exhibit 51c**, attached hereto.

On February, 26, 2003, the Commission granted OP's Motion.[7] *See id.* The hearing before the Commission on the OSC (the "**Halekua OSC**") was scheduled for April 25, 2003; however, just prior to the commencement of the hearing, Halekua filed a bankruptcy petition with the U.S. Bankruptcy Court of the District of Hawai'i and, pursuant to the automatic stay under federal bankruptcy laws, the hearing on the Halekua OSC was suspended indefinitely. *See* **Exhibit 51d** (Halekua 2007 Annual Report), attached hereto.

On February 23, 2007, after the stay was lifted, the Commission held a hearing on the Halekua OSC. During the hearing, Halekua moved to orally dismiss the Halekua OSC. In support of its motion, Halekua offered ***evidence of financing*** it had secured that would pay off its creditors and be used to satisfy several of the conditions of approval imposed under the Halekua D&O. Halekua also emphasized that it had ***hired a new local, third-party project manager*** to handle the pre-development stages of the Royal Kunia Phase II project and that it had ***partially*** fulfilled the condition requiring ***dedication of the Agricultural Park to the State*** in 2004 (*i.e.*, without the required infrastructure completed). *See* **Exhibit 51e** (Order Granting Halekua's Oral Motion to Dismiss OSC, dated Mar. 16, 2007) & **Exhibit 51f** (Jan. 9, 2009 Status Hearing Minutes), attached hereto. Halekua also had a representative from State Department of Education ("**DOE**") testify that DOE and Halekua were close to entering into an agreement regarding the School Site Commitment. Based on these representations and assurances, the Commission found ***good cause*** for Halekua's oral motion to dismiss the Halekua OSC and voted 6-2 to grant the motion. *See id.*

[7] In stark contrast, the May 23, 2018 Status Hearing on this Docket was held only months after the running of the 10-year deadline for completion of the backbone infrastructure for the Project, and the OSC hearing was initially scheduled mere months later on August 22-23, 2018.

Other instances of the Commission affording petitioners additional opportunities to bring their projects into compliance with their respective D&Os without resort to an immediate reversion, even after the issuance of an OSC, can be found in Docket Nos. A87-617 (Bridge Aina Le'a, LLC)[8] and A94-706 (Ka'ono'ulu Ranch).[9] *See also* **Exhibit 53a** through **Exhibit 53d** (select materials from Docket No. A10-788, Hawai'i Housing and Finance Development Corporation and Forest City Hawai'i Kona, LLC), attached hereto; **Exhibit 54a** through **Exhibit 54d** (select materials from Docket No. A00-730, Lanihau Properties, LLC), attached hereto. In addition, WHI respectfully requests that the Commission take administrative notice of all other Docket materials for the Dockets specifically referenced herein pursuant to HAR § 15-15-63(k).

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[8] *See Aina Le'a*, 134 Hawai'i at 190-205, 339 P.3d at 688-703 (summarizing Docket history)

[9] There, the Commission reclassified the petition area ***in 1995*** to allow for the development of an industrial park. *See* **Exhibit 52a** (Findings of Fact, Conclusions of Law, and Decision and Order in Docket No. A94-706 ("**Piilani D&O**")) at ¶21, attached hereto. After the petition area exchanged hands a number of times, Piilani Promenade South, LLC and Piilani Promenade North, LLC (collectively, the "**Piilani Entities**") purchased a portion of the Petition Area in 2010. *See* **Exhibit 52b** (Piilani Promenade South, LLC and Piilani Promenade North, LLC's Motion to Stay Phase II of the Order to Show Cause Proceeding, filed Apr. 8, 2013) at 1, attached hereto. The Piilani Entities apparently did not file a motion to modify the D&O in Docket A94-706 to allow for their proposed non-industrial project. Instead, the Piilani Entities proceeded to pursue development of a retail shopping complex, which had never been presented to, let alone approved by, the Commission. The Piilani Entities went so far as to obtain grading permits, placing the Piilani Entities "in a position to begin construction of on-site and off-site infrastructure[.]" **Exhibit 52c** (Piilani Entities 2013 Annual Report) at 3, attached hereto.

On August 23, 2012, ***approximately seventeen years after the initial reclassification***, the Commission held a hearing on a Motion for Hearing, Issuance of Order to Show Cause and Other Relief, filed by Maui Tomorrow Foundation, Inc. (the "**MTF Motion**"). *See* **Exhibit 52d** (Aug. 23, 2012 meeting minutes). At the conclusion of that hearing, the Commission granted the MTF Motion and ordered the Piilani Entities to show cause why its land should not be reverted ("**Piilani OSC**"). After holding a number of hearings on the Piilani OSC, the Commission found, *inter alia*, that the Piilani Entities (and others) violated one condition under the D&O (annual reports) and that the Piilani Entities' proposed development would violate two additional conditions, including developing in substantial compliance with representations made to the Commission, the failure of which could result in a reversion. *See* **Exhibit 52e** (Piilani Entities Status Report, filed July 5, 2018) at 3, attached hereto. Thereafter, instead of proceeding to Phase II to determine whether to order a reversion, on July 13, 2013 – ***approximately eighteen years after the initial reclassification by the Commission and more than one year after issuing the Piilani OSC*** – the Commission voted 7-0 to grant the Piilani Entities' Motion to Stay Phase II of the Order to Show Cause Proceeding to allow the Piilani Entities to process an Environmental Impact Statement ("**EIS**").

In May 2017, ***almost four years after granting the Piilani Entities' Motion to Stay Phase II, five years after issuing the OSC, and twenty-two years after the initial reclassification***, the Piilani Entities informed the Commission that they would be withdrawing their Final EIS from consideration. *See* **Exhibit 52f** & **Exhibit 52g**, attached hereto. The Piilani Entities then re-filed their Final EIS in late June 2017, and the Commission subsequently voted to deny acceptance of the Final EIS in July 2017. *See* Exhibit 52f. Yet, more than a year after voting to deny the Final EIS – the sole reason for the Commission staying Phase II of the OSC proceedings – the Commission only recently ordered a status hearing on Docket A94-706 for December 2018.

The examples provided herein are by no means intended to be an exhaustive enumeration of all instances in which the Commission has afforded petitioners additional opportunities to get their projects back into compliance with their respective D&Os without immediate resort to a reversion.

The parallels between the efforts undertaken by Halekua to get its project back on track and those taken by WHI are undeniable. WHI is simply asking for the same opportunity to bring its Project into compliance with the D&O that the Commission has afforded to countless other petitioners under similar, and at times more egregious, circumstances. The County is on record stating that it "could agree to the concept of [the Proposed Stipulation,]" Exhibit 19 at 26:5-12, and that it prefers that a reversion is not ordered. *See, e.g.*, Exhibit 45 at 50:3-5 ("As mentioned previously by counsel, the preference of the County is that it remain rural."); Statement of Position of County of Hawai'i Planning Department on Land Use Commission's Order to Show Cause, filed October 23, 2018, at 2 ("[T]he County respectfully requests that the Land Use Commission not revert the Subject Area to its former land use classification . . . , but instead maintain the present rural classification[.]"). And both WHI and the County testified to the significant delay in the development of the Petition Area that would result from a reversion (discussed in greater detail in Section III.E, *infra*).

If the Commission is unwilling to provide WHI with an opportunity to bring the Project into compliance with the D&O, that decision must be supported by a legitimate reason. *See, e.g.*, *Northwest Environmental Defense Center v. Bonneville Power Admin.*, 477 F.3d 668 (9th Cir. 2007) ("An agency is entitled to change its course when its view of what is in the public's interest changes; however, an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored,

and if an agency glosses over or swerves from prior precedents without discussion, it may cross the line from the tolerably terse to the intolerably mute."); *Begay v. Office of Navajo and Hopi Indian Relocation*, 305 F. Supp. 3d 1040 (D. Ariz. 2018) ("An administrative agency's decision is arbitrary and capricious under the Administrative Procedure Act (APA) if the agency fails to follow its own precedent or fails to give a sufficient explanation for failing to do so."); *Catalina Yachts v. U.S. E.P.A.*, 112 F. Supp. 2d 965 (C.D. Cal. 2000) ("While an agency may announce new principles in an adjudicatory proceeding, it may not depart, *sub silentio*, from its usual rules of decision to reach a different, unexplained result in a single case."). WHI's review of the record reveals no such legitimate reason.

Instead, the record reflects that, in addition to taking irrevocable actions towards developing the Project, WHI has accepted ultimate responsibility for the Project not being timely completed and has made strong commitments to the Commission that it is ready, willing, and able to proceed with the Project if given an opportunity to do so. *See, e.g.*, **Exhibit 55** (Oct. 24, 2018 Hr. Tr.) at 26:20-84:6, attached hereto. WHI has emphasized that Mr. Martirosian no longer has any involvement whatsoever with the Project, the Petition Area, WHI, or any of its affiliates. *See id.* 29:13-24; 33:16-19. WHI provided documents to the Commission demonstrating that its affiliates have taken civil and criminal action against Mr. Martirosian, and but for the opportunity to discover all of the facts relating to this Project, nothing has foreclosed WHI from doing the same here in Hawai'i.[10] *See, e.g.*, Exhibit 2; Exhibit 25.

[10] There a numerous considerations that must be taken into account when deciding whether to commence a lawsuit, and ultimately such a decision is driven by business considerations. The fact that WHI itself has yet to commence any legal action against Mr. Martirosian for his misdeeds in connection with the Petition Area and the Project is primarily related to ongoing discovery of the facts, and should in no way be construed to mean that WHI does not have legitimate allegations against him, that these allegations should not be taken seriously by the Commission, or that these allegations do not provide a basis for find good cause.

WHI has hired new internal management, brought on a new Hawai'i-based project manager, and retained its present counsel to assist on the Project's land use issues and entitlements. WHI's project manager Joel LaPinta, who the Commission accepted as an expert in real estate development and sales, has thirty-two years of experience in real estate development and marketing, and has past experience with other developments similar to the Project. *See*. *See* **Exhibit 56** (Written Direct Testimony of Joel LaPinta, dated Nov. 18, 2018) at 2:1-4:21, attached hereto.

Mr. LaPinta has done a comprehensive market analysis and feasibility study for the Project. *See id.* at 7:20-11:20. Based upon his decades of experience, technical expertise, and the extensive information reviewed and analyzed in his feasibility study for the Project, Mr. LaPinta firmly believes that the project is feasible, in part because the lots will be larger than those currently on the market, because of the superior location of the Petition Area, and because the lots will be priced below most other similar products sold over the last twelve years. *See id.* at 11:11-20.

In addition, based upon discussions with various real estate brokers, Mr. LaPinta has concluded that there will be a demand for the Project's lots. *See id.* at 14:1-7. The lots will be attractively priced and well located for primary, retirement, and secondary homes, and the potential market includes purchasers from the County, the State and the mainland. *See id.* Mr. LaPinta has also had preliminary discussions with two local developers/contractors on a potential partnership to develop the Project, both of whom expressed interested in the Project pending the Commission's resolution of the OSC. *See id.* at 7:15-19.

WHI has also secured the necessary financing commitment in the amount of $45,000,000

from Armbusiness Bank CJSC ("**ABB**") to complete the Project, and these funds have been committed for the specific purpose of completing the Project. *See* **Exhibit 57** (Letter of Confirmation from Vitaly Grigoryants, dated Nov. 9, 2018), attached hereto; Exhibit 20.

WHI has repeatedly explained why a subdivision for the sale of undeveloped lots is ***different in kind*** from the vertical construction required for projects like the one at issue in *Aina Lea*. *See, e.g.*, Exhibit 19 at 16:7-17:8; WHI's Supplemental Statement of Position on Order to Show Cause and Reversion of Petition Area, filed Oct. 12, 2018, at 19-21. WHI has also presented evidence that many of the engineering and other related plans necessary for the Project to proceed have largely been completed. *See, e.g.*, Exhibit 45 at 95:15-18; Exhibits 12, 22, & 22a through 22e; Exhibit 56 at 7:24-27. WHI elicited expert testimony that these necessary Project plans could be completed to the County's satisfaction within approximately two years, which includes the approximately one year it would take to process an amendment to the rezoning ordinance for the Petition Area. *See, e.g.*, Exhibit 55 at 95:21- 96:14; Exhibit 56 at 10:4-12.

Once the Project plans are complete and approved by the County agencies, WHI would only need to complete the following to begin selling individual lots: (1) obtain competitive bids from contractors; (2) enter into a subdivision agreement with the County; (3) post a completion bond to secure the bid price for the improvements; and (4) register under the Uniform Land Sale Practices Act with the State of Hawai'i Department of Commerce and Consumer Affairs ("**DCCA**"). *See* Exhibit 55 at 96:15-97:7. Assuming the Commission does not revert the Petition Area, and depending on whether the County will allow concurrent or require sequential processing of the applications for rezoning and subdivision, the closings on binding contracts for the Project could commence ***in approximately 24 months to 34 months***. *See* Exhibit 56 at 14:8-

12.

However, the Commission also heard testimony that a reversion could potentially set back the Project ***for years***. According to County planner Jeff Darrow, if the Commission orders a reversion and a subsequent reclassification of the Petition Area back into the SLU Rural District was not sought, WHI would need to process an amendment of the County General Plan in order for a substantially similar project to proceed. *See* Exhibit 45 at 68:9-18.

However, the County is currently in the process of its ten-year comprehensive update to the General Plan, and during this time individual landowners cannot process their own interim General Plan Amendments. *See* Hawai'i County General Plan (Ordinance Nos. 07-07 & 09-191) at §§ 16.2(1)(a), 16.2(2)(a), 16.2(3)(a). Instead, WHI would have to petition the County for the Petition Area to be included in its comprehensive review, and await the County's formal processing. According to Mr. Darrow, that process could take in ***excess of three years to complete***. *See* Exhibit 45 at 88:7-13. In addition, the County has testified that WHI would not be able to process its rezoning request until after the comprehensive review of the General Plan is complete, which would add approximately another year, ***for a potential Project delay of four or more years***. *See* Exhibit 45 at 34:15-19.

The framework set forth in the Proposed Stipulation presents the Commission with a reasonable, good faith alternative to defer action on the OSC, which in no way would impinge upon the Commission's enforcement powers. The Proposed Stipulation would: (1) allow WHI to continue to demonstrate to the Commission that it is competent and committed to developing the Project; (2) allow OP to provide continued input; (3) provide the County sufficient time to discharge its role in implementing the Project; (4) allow the Commission to conclude its current

rule-making process; and (5) most importantly, preserve the Commission's enforcement powers under the OSC. If the Commission later determinates that WHI has not satisfied its obligations under the Proposed Stipulation, it can proceed to consider taking action on the OSC with the benefit of its rule-making process being completed.

The Commission has numerous ways to ensure that WHI proceeds with the Project in an orderly and timely fashion without resort to the radical remedy of a reversion. Based upon the Commission's historical treatment of other delayed projects, the justification WHI has provided for its failure to timely complete the Project, and the time, money and resources WHI (and its predecessors) have put into the Project, the most appropriate exercise of the Commission's discretion in this matter would be to afford WHI the opportunity to get the Project back on track. The Proposed Stipulation provides this opportunity without the risk of prejudice to the Commission or the other Parties.

III. DISCUSSION OF COMMISSION'S REQUESTED LEGAL ISSUES

At the October 25, 2018 hearing on the OSC, Chair Scheuer ordered supplemental briefing on six specific legal issues (four requested by Commissioner Okuda, one by Commissioner Edmund Aczon, and one by Commissioner Dawn N. S. Chang), as well as clarification on some exhibits submitted to the Commission in light of subsequent testimony received (requested by Vice Chair Nancy Cabral).

In the event that the Commission remains unwilling to defer action on the OSC, the following supplemental briefing demonstrates that WHI has substantially commenced its use of the land and that good cause exists to excuse WHI's failure to timely develop the Project and to maintain the Petition Area's SLU Rural District classification.

A. SUBSTANTIAL COMMENCEMENT

First, Commissioner Okuda requested supplemental briefing on the following:

> Number 1, what constitutes, quote, "substantial commencement of the use of the land", close quote, as that phrase is used in the Bridge Aina Le'a case, including specifically at 339 Pacific 3rd at 710.
>
> And related to that, what is the definition of the word, quote, "use", u-s-e, close quote, as that word is used in the phrase that I just quoted.

Exhibit 45 at 102:24-103:6.

The seminal (and, in fact, only) case addressing "substantial commencement of the use of the land" is *Aina Le'a*. There, the court observed that:

> [HRS §] 205-4(g) does not include a definition of "substantial commencement" . . . . "Substantial" is, according to Blacks's [sic] Law Dictionary, "considerable in amount or value; large in volume or number." In drafting HRS § 205–4(g), ***the legislature did not require that the use be substantially completed, but rather that it be substantially commenced***. This is consistent with the ***concerns identified by the legislature*** in the legislative history of the statute, i.e., ***that it was trying to deter speculators who obtained favorable land-use rulings and then sat on the land for speculative purposes***.

Aina Le'a, 134 Hawai'i at 213, 339 P.3d at 711 (emphasis added).

The court made clear that the facts and circumstances involved in *Aina Lea* are not the only set of facts under which substantial commencement could be found. Instead, "a determination of whether a party has substantially commenced use of the land ***will turn on the circumstances of each case, not on a dollar amount or percentage of work completed***." *Id.* at 214, 339 P.3d 712 n.16 (emphases added).

As to the facts demonstrating substantial commencement in *Aina Lea*, the court pointed

to the ***partial*** construction of affordable housing and other "non-construction" land use activities. In affirming the lower court's determination that the Commission's finding that the developers had not substantially commenced their use of the land was clearly erroneous, the court specifically noted the lower court's finding that the developers "continued to actively proceed with ***preparation of plans and studies, including building plans and studies for the EIS***." *Id.* at 214, 339 P.3d 712. Therefore, actions taken in the preparation of plans and studies, and expenditures made by a petitioner to advance its project to comply with the conditions imposed by the Commission that do not involve ground-disturbing or vertical "construction" activities do, in fact, count in the Commission's determination of "substantial commencement."

The facts of this case, and the D&O Conditions imposed by the Commission, underscore why the *Aina Le'a* court made clear that substantial commencement must be determined on a case-by-case basis. For example, D&O Condition No. 3 provides that the Commission may issue an order to show cause if WML (now WHI) fails to complete "buildout of the Project ***or secure a bond for completion thereof***." (Emphasis added). This condition implicitly recognizes that WHI can attain "substantial commencement" without breaking ground or constructing any improvements.

However, a bond is not something that can be obtained without other prior actions by the petitioner. In order to secure a bond for subdivision infrastructure improvements, the following would need to be accomplished: (1) obtain Tentative Subdivision Approval from the County; (2) register the subdivided lots with the DCCA and obtain a preliminary order of registration; (3) market the project and enter into sales contracts (that provide for the right of rescission in the event that Final Subdivision Approval is not obtained) and/or non-binding reservation agreements; (4) concurrently prepare and obtain County approval for construction drawings and

other necessary plans; (5) obtain competitive bids for the infrastructure improvements based upon the County-approved plans; (6) post a completion bond for the infrastructure improvements; (7) obtain Final Subdivision Approval from the County; and (8) process an application for and obtain a Final Order of Registration from the DCCA. All of these steps – none of which involve touching the ground, but all of which are very costly in terms of time, money and resources – are actions taken in pursuit of "substantial commencement." That is why this Project is ***different in kind*** from other projects reviewed by the Commission in OSC proceedings. Therefore, the absence of "construction" or ground disturbance does not mean that a petitioner has not or cannot attain substantial commencement.

Consistent with the court's interpretation in *Aina Le'a*, WHI respectfully submits that ***whether there has been "substantial commencement of the use of the land" should be determined upon whether the petitioner has taken concrete actions demonstrating that it has not sat on its land for speculative purposes***. *See Aina Le'a*, 134 Hawai'i at 213, 339 P.3d at 711. WHI's proffered interpretation "is consistent with the concerns identified by the legislature in the legislative history of [HRS § 205-4(g)], *i.e.*, ***that it was trying to deter speculators who obtained favorable land-use rulings and then sat on the land for speculative purposes***." *Id.*, 339 P.3d at 711 (emphases added).

With respect to the word "use," as used in HRS § 205-4(g), it clearly has a broader meaning than physically using land or ground-breaking construction activities. For the reasons discussed above, "use" is not synonymous with "construction." *See also* Exhibit 21 at 2-3. Indeed, the *Aina Le'a* court specifically pointed to the developers' preparation of an EIS and other plans (*i.e.*, non-construction activities) as evidence of substantial commencement. *See Aina Le'a*, 134 Hawai'i at 214, 339 P.3d 712.

The Proposed Amendment confirms this distinction. As discussed *supra*, the Proposed Amendment initially required "substantial commencement of ***construction***." *See* Exhibit 46 (emphases added). However, after holding an initial round of public hearings and receiving public comment, including comments in strong opposition from WHI, *see generally* Exhibit 21, the Commission revised the Proposed Amendment to remove the word "construction" and replaced it with "use of the land." *See* Exhibit 47 . Thus, by the Commission's own admission, "use" is not synonymous with "construction."

Based on the foregoing, WHI respectfully submits that ***the preparation of plans and studies, the securing of entitlements and other governmental approvals, the subdivision of land, and the irrevocable conveyance of land in satisfaction of a petitioner's affordable housing obligations (especially where the land is subdivided from the petition area) are "uses" of the land for the purpose of determining whether there has been substantial commencement.***

Turning to the facts and circumstances of this case, WHI has substantially commenced its use of the land. *See id.* at 214, 339 P.3d at 712 ("[W]hether a party has substantially commenced use of the land will turn on the circumstances of each case, not on a dollar amount or percentage of work completed."). As WHI has previously explained, the entitlements history for the Project make it different in kind from most other projects reviewed by the Commission, and this distinction is absolutely critical to understanding why WHI has achieved substantial commencement.

Ordinarily, a district boundary amendment is one of, if not the very first entitlement a developer will obtain for a project. Thereafter, the developer would proceed to obtain other State- and County-level entitlements, prepare the necessary plans and studies for the project, and

work towards satisfaction of other conditions of approval imposed by the Commission, including its affordable housing obligations. As discussed above, all of these actions would be direct evidence of "substantial commencement."

Here, however, at the time of reclassification in 2008, the Project already had its County-level land use entitlements in place, including its zoning and General Plan designations, and WML only sought reclassification from the Commission as a condition imposed by the County when WML obtained a time extension to the rezoning ordinance for the Petition Area in 2005. *See, e.g.*, Exhibit 4. In addition, in 2007, WML's HRS Chapter 343 Final EIS had already been accepted by the Commission and the necessary project plans and studies were already substantially complete. *See, e.g.*. Exhibits 22, 22a through 22e; Exhibit 12; Exhibit 17; D&O at 2 (noting filing and Commission acceptance of WML's EIS).

Since the reclassification, WHI (and previously WML) have taken concrete steps towards developing the Project and satisfying the D&O Conditions. Most significantly, as has been repeatedly discussed, WHI achieved full satisfaction of D&O Condition No. 9 through the irrevocable conveyance of 11.7-acres of land (the "**AH Parcel**")[11] with a current County real property tax assessed value of $921,900 and apparent market value of $1,500,000 in a subsequent County-approved sale. *See* Exhibit 56 at 12:4-9; *see also id.* at 12:10-25 (discussing significantly increased value of AH Parcel with County entitlements available under HRS Chapter 201H).

WHI's recent efforts to advance the Project also demonstrate substantial commencement. These good faith efforts include, without limitation, reconnecting with the Project engineers and

[11] The AH Parcel is presently identified by TMK No. (3) 6-8-002: 057.

other consultants to update the Project plans and construction costs, conducting additional archaeological work towards satisfaction of D&O Condition No. 11, meeting with a PUC-regulated private water company on water service to the Project, obtaining a commitment letter for financing of the Project construction, and researching the current market conditions to determine the appropriate real estate product and pricing for the Project. As previously noted, WHI is also discussing additional opportunities (over and above the 11.7-acre parcel already conveyed by WHI in full satisfaction of D&O Condition No. 9) to provide affordable housing in cooperation with OHCD. *See* Exhibit 59a; Exhibit 59b; Exhibit 60. An immediate reversion would likely bring these discussions to a halt.

WHI elicited expert testimony that the necessary Project plans could be completed to the County's satisfaction within twenty-six months, which includes the approximately one year it would take to process an amendment to the rezoning ordinance for the Petition Area. *See, e.g.*, Exhibit 55 at 95:15-18, 96:5-14. Once the Project plans are complete and approved by the County agencies, WHI would only need to complete the following to begin selling individual lots and achieve "build out" under D&O Condition No. 2: (1) obtain competitive bids from contractors; (2) enter into a subdivision agreement with the County; (3) post a completion bond to secure the bid price for the improvements; and (4) register under the Uniform Land Sale Practices Act with the DCCA. *See id.* at 96:15-97:7. A project that could be completed within approximately ***three years*** clearly has been substantially commenced and should not be given the death sentence of a reversion. *See* Exhibit 56 at 14:8-12.

Under these circumstances, WHI has substantially commenced its use of the land and a reversion should not be ordered.

B. STANDARD TO BE APPLIED IN THE EVENT THAT THE COMMISSION DOES NOT FIND SUBSTANTIAL COMMENCEMENT

Second, Commissioner Okuda requested supplemental briefing on the following:

> Number two, I would ask for additional briefing on the issue with respect to if the Land Use Commission finds that the Petitioner has not substantially commenced the use of the land in accordance with its representations, what is the legal standard the Land Use Commission must apply and follow before it can order the land reverted to its prior classification.

Exhibit 45 at 103:7-14.

HRS § 205-4(g) provides that, if the Commission determines that there has not been substantial commencement, it can issue "an order to ***show cause*** why the property should not revert to its former land use classification or be changed to a more appropriate classification." (Emphasis added). Thus, if the Commission determines that WHI has not substantially commenced its use of the land, the dispositive question would be whether there is "good cause"[12] to excuse WHI's failure to timely complete the Project and to maintain the Petition Area's present SLU Rural District classification.

As the Hawai'i Supreme Court has explained:

> [T]he term "good cause" has been defined to mean "***a substantial reason amounting in law to a legal excuse for failing to perform an act required by law***." "Good cause" also "***depends upon the circumstances of the individual case***, and a ***finding of its existence lies largely in the discretion of the officer or court to which [the] decision is committed***."
>
> . . .
>
> As a general rule, "good cause" means a substantial reason; one that affords a legal excuse . . . .

[12] It is generally understood that showing "cause" pursuant to an OSC requires a showing "good cause." *See, e.g.*, Statement of Position of the Office of Planning on the Land Use Commission's Order to Show Cause, filed October 12, 2018, at 10-11 (arguing that WHI has failed to show "good cause").

> . . .
>
> Thus, "['good cause'] is a ***relative and highly abstract term***, and its meaning must be determined not only by verbal context of [the] statute in which [the] term is employed[,] ***but also by context of action and procedures involved in [the] type of case presented.***"

Doe v. Doe, 98 Hawai'i 144, 154, 44 P.3d 1085, 1095 (2002) (emphases added) (citations omitted).

Therefore, a determination of whether "good cause" exists here is a discretionary[13] determination by the Commission of whether WHI has provided a "substantial reason" for its failure to timely develop the Project ***and*** to maintain the Petition Area's SLU Rural District classification. In its Supplemental Statement of Position, WHI noted that:

> WHI concedes that it could not find a case, statute, or regulation specifically establishing that allegations of fraud, gross mismanagement of a project, and breaches of fiduciary duties committed by a corporation's agent against the corporation constitute good cause to excuse the corporation's failure to meet its obligations under a D&O issued by the Commission. ***However, that should not be surprising***.
>
> ***Nowhere in HRS Chapter 205 or the Commission's rules, including HAR § 15-15-93, is there an enumeration of any specific grounds for finding good cause. Further, WHI is not aware of any case law establishing what constitutes good cause for avoiding a reversion*** by the Commission pursuant to an OSC, which underscores how rare the Commission acts upon an OSC

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[13] HRS § 91-14(g), governing judicial review of contested case hearings, provides that:

> Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> . . .
>
> 6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"[U]nder HRS § 91–14(g), . . . an agency's exercise of discretion [is reviewable] under subsection (6)." *Medeiros v. Hawaii Dept. of Labor & Indus. Relations*, 108 Hawai'i 258, 265, 118 P.3d 1201, 1208 (2005).

> and the truly radical remedy that a reversion represents when pursued over the objection of the landowner.
>
> ***That is not to say, however, that the Commission is without sufficient authority to find, based upon the evidence and testimony presented, that Mr. Martirosian's fraudulent acts and gross mismanagement of the Project constitute good cause under the circumstances. HRS § 205-4(g) and HAR § 15-15-93 both clearly vest the Commission with discretion to both issue an OSC and determine whether good cause exists***.

WHI Suppl. SOP at 14-15 (emphases added).

To be clear: The above-quoted statement should in no way be construed as an admission by WHI that its allegations of fraud, gross mismanagement of the Project, and breaches of fiduciary duties by Mr. Martirosian do not constitute good cause. To the contrary, WHI simply noted that the legislature has not enacted any statutes, the Commission has not promulgated any rules, and the courts have not decided any reported cases setting forth any specific grounds under which good cause can be established to fend off a reversion by the Commission. This is simply an accurate statement of the law. If a specific statute, rule, or case establishing particular grounds for good cause was required, a petitioner could never demonstrate good cause to the Commission because no such statute, rule, or case presently exists. *See generally* HRS Chapter 205; HAR Title 15, Subtitle 3, Chapter 15. A review of numerous OSC Dockets suggests that the Commission has never previously required a specific statute, rule, or case to establish good cause to avoid a reversion.

Instead, HRS § 205-4(g) vest the Commission with discretion to determine whether good cause exists. Indeed, the Commission has found good cause under strikingly similar, albeit sometimes more egregious, circumstances.

As discussed above, the Commission dismissed the Halekua OSC after finding that

Halekua had shown good cause. The Commission found good cause after Halekua presented testimony and evidence demonstrating that it had secured financing to complete the project, engaged a third-party project manager, and dedicated an the agricultural park as was required under the Halekua D&O (although the required infrastructure was not completed at the time of conveyance).

Here, WHI has presented uncontroverted evidence and credible testimony that it has taken extremely similar measures to demonstrate good cause and assure the Commission that it is willing and able to proceed with the Project. WHI has secured financing for the Project, hired a third-party project manager (whom the Commission recognized as an expert in real estate development and sales), had preliminary discussions with potential development partners, and conveyed 11.7-acres of land in satisfaction of its affordable housing obligations under D&O Condition No. 9. In addition, similar to the delay caused in Halekua as a result of its bankruptcy, WHI has submitted substantial evidence and elicited credible testimony that Mr. Martirosian's numerous bad acts resulted in the delay of the Project being timely developed. ***The parallels are undeniable.***

For these reasons ***and*** Mr. Martirosian's numerous misdeeds, some of which are discussed further in Section III.D, *infra* (addressing Commissioner Okuda's fourth issue), WHI has established good cause to excuse its failure to timely develop the Project and to maintain the Petition Area's SLU Rural District classification.

C. WHI'S SATISFACTION OF ITS AFFORDABLE HOUSING OBLIGATIONS IS DIRECT, IF NOT CONCLUSIVE EVIDENCE THAT WHI HAS SUBSTANTIALLY COMMENCED ITS USE OF THE LAND

Third, Commissioner Okuda requested supplemental briefing on following:

> Number 3, I would ask further briefing on legal authority, again, statute, rule or case law on the issue of whether the documents executed by and between the Petitioner and the County of Hawai'i relative to the affordable housing condition or component is evidence of, quote, "substantial commencement of the use of the land," close quote, as that phrase is used in the *Bridge Aina Le'a* case, including specifically at 339 Pacific 3rd at 710.

Exhibit 45 (Oct. 25, 2018 Hr. Tr.) at 103:15-23.

D&O Condition No. 9 provides that:

> Affordable Housing. Petitioner shall provide affordable housing opportunities for residents in the State of Hawai'i in accordance with applicable affordable housing requirements of the County. ***The location and distribution of the affordable housing or other provisions for affordable housing shall be under such terms as may be mutually agreeable between Petitioner and the County***, Petitioner shall provide the Commission with a fully executed copy of the affordable housing agreement within 30 days of the execution of the agreement.

(Emphases added).

As discussed above, *Aina Lea* is the only case on what constitutes "substantial commencement of the use of the land." In determining whether the developers had substantially commenced their use of the land, the court focused, in large part, on the developers' efforts to satisfy their affordable housing obligations imposed by the Commission:

> ***Rather than holding the land undeveloped for speculative purposes***—the result which the legislature sought to avoid in HRS § 205–4(g)—Bridge and DW invested a considerable amount of money and effort, by any reasonable measure, ***to develop the affordable housing. In these circumstances, Bridge and DW substantially commenced use of the land***.

Aina Le'a, 134 Hawai'i at 214, 339 P.3d at 712 (emphases added).

In other words, *Aina Le'a* establishes that a petitioner's efforts towards satisfying its affordable housing obligations are relevant to, and potentially determinative of, whether there

has been substantial commencement. The fact that *Aina Le'a* involved the construction of affordable units, while WHI satisfied D&O Condition No. 9 through the conveyance of undeveloped land, is of no consequence and does not mean that satisfaction of D&O Condition No. 9 does not constitute substantial commencement. Here, the Project does not involve vertical construction of single- or multi-family units. Therefore, instead of developing affordable units within the Petition Area, WHI and the County agreed that WHI would satisfy its affordable housing obligations through the subdivision and conveyance of a ***portion of the Petition Area***. And unlike the project in *Aina Le'a*, which did not fully satisfy its affordable housing obligations (failed to obtain certificates of occupancy), WHI here has fully satisfied its affordable housing obligations under D&O Condition No. 9. For the reasons discussed above,[14] the subdivision and conveyance of land is clearly a "use" of the land or a "land use," and can constitute "substantial commencement of the use of land" when doing so is required as a condition under a D&O.

From a policy perspective, declaring otherwise would be dangerous. Considering only money, land, and resources expended on ***building*** affordable units as evidence of substantial commencement would set a very dangerous precedent for the Commission, as petitioners satisfying their affordable housing obligations through the subdivision and conveyance of undeveloped land (like WHI) would have no incentive (if not a negative incentive) to do so upfront.

The Affordable Housing Agreement between WHI and the County, dated December 1, 2016 (the "**AH Agreement**"), and the Affordable Housing Release Agreement between WHI

[14] As discussed in detail *supra*, "use" and "construction" are not synonymous, and the preparation of plans and studies, the securing of entitlements and other governmental approvals, the subdivision of land, and the irrevocable conveyance of land in satisfaction of a petitioner's affordable housing obligations (especially where the land is subdivided from the petition area) are "uses" of the land for the purpose of determining whether there has been substantial commencement.

and the County, dated July 20, 2017 (the "**AH Release**"), were specifically negotiated and executed to comply with D&O Condition No. 9 and WHI's parallel affordable housing obligations under Condition E of County Rezoning Ordinance No. 13-29. The County is already on record admitting this. *See* Exhibit 45 at 27:22-24.

WHI's satisfaction of D&O Condition No. 9 is significant – if not dispositive – evidence of substantial commencement of its use of the land. At its sole cost and in furtherance of the AH Agreement, WHI processed a subdivision application to subdivide the 11.707-acre AH Parcel ***"using" a portion of the Petition Area*** in 2017. *See* Exhibit 9 (Subdivision Application, dated March 22, 2017). Thereafter, ***just over one year ago on June 1, 2017***, WHI conveyed the AH Parcel to an entity believed to have been ***selected by the County***, Plumeria at Waikoloa, LLC ("**PWL**"), at ***no cost*** to PWL or the County. Exhibit 23 at ¶¶4.

The AH Parcel's current tax assessed value is ***$921,900***, and the AH Parcel was recently sold by PWL to Pua Melia LLC ("**PML**") on April 24, 2018 for ***$1,500,000***. *See* **Exhibit 58** (County Real Property Tax Info), attached hereto; Exhibit 56 at 12:4-9. WHI in no way benefited, financially or otherwise, from this subsequent sale of the AH Parcel from PWL to PML. *See* Exhibit 23 at ¶9. WHI understands that the sale of the AH Parcel to PML was also consummated with the County's direction and approval.

As set forth in WHI's Motion of Issuance of a Subpoena and Subpoenas Duces Tecum, filed November 7, 2018, on the eve of the Commission's first hearing on the OSC and without prior notice to WHI, the County claimed to have "concerns" about the AH Agreement and AH Release. These concerns are directly contrary to the County's prior verbal and written representation's to WHI that it had satisfied its affordable housing obligations for the Project.

The County's purported concerns include: (1) the fact that PWL is not a non-profit entity; (2) the AH Parcel not being a sufficient size to accommodate the 80 units WHI is required to provide; (3) PWL's subsequent sale of the AH Parcel to PML; and (4) the AH Parcel having an unusual characteristic (drainage easement) that make it difficult to develop. OP has since adopted these concerns wholesale. *See* Exhibit 39 at 96:1-97:15.

The County's purported concerns with WHI's satisfaction of D&O Condition No. 9 are without merit. **First and foremost**, the County has no basis to repudiate the AH Agreement and AH Release on the grounds that PWL is not a non-profit entity. PWL is specifically mentioned in the AH Agreement and, more importantly, WHI is informed that ***it is the County who selected PWL to take title to the AH Parcel under the AH Agreement***. While it is true that Hawai'i County Code ("**HCC**" or "**County Code**") § 11-5(a)(5) requires that land dedicated to satisfy a developer's affordable housing obligations be conveyed to "the County or, ***at the County's direction*** to a non-profit entity" (emphasis added), the County cannot now claim a failure to comply with D&O Condition No. 9 when all WHI did was follow the County's instructions. *See Burmeister v. County of Kaua'i*, No. CV 16-00402 LEK-KJM, 2018 WL 2050131, at *7 (D. Haw. May 2, 2018) ("The County's contention that the Planning Director and Deputy County Attorney exceeded their actual authority [in executing the settlement agreement] is not reached; it is enough that they acted with apparent authority." (citation omitted)). It made absolutely no difference to WHI who the AH Parcel was to be conveyed to.

Under the circumstances of this case, the County is estopped from repudiating the AH Agreement and AH Release, and from denying WHI's satisfaction of D&O Condition No. 9. "[T]he doctrine of equitable estoppel is ***fully applicable against the government*** if it is necessary to invoke it ***to prevent manifest injustice***." *See Tax Appeal of Dir. of Taxation v. Medical*

Underwriters of Cal., 115 Hawai'i 180, 193-94, 166 P.3d 353, 366 (2007) (emphasis added). "[T]the essence of [promissory estoppel] is detrimental reliance on a promise." *Ravelo by Ravelo v. Hawaii County*, 66 Haw. 194, 199, 658 P.2d 883, 887 (1983) (citation omitted).

In part, equitable estoppel:

> ***has its basis in election, waiver, acquiescence, or even acceptance of benefits and which precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him***. No concealment or misrepresentation of existing facts on the one side, no ignorance on the other, are necessary ingredients.

Godoy v. Hawai'i Cty., 44 Haw. 312, 320, 354 P.2d 78, 82 (1960). "Put in more colloquial terms: '***[O]ne cannot blow both hot and cold.***'" *University of Hawai'i Professional Assembly on Behalf of Daeufer v. Univ. of Hawai'i*, 66 Haw. 214, 221, 659 P.2d 720, 726 (1983) (emphasis added). The County cannot blow both hot and cold, and suddenly claim that WHI has not satisfied D&O Condition No. 9 after it irrevocably conveyed the AH Parcel to PWL under the terms the County insisted upon.

In addition, as a practical matter, the initial conveyance of the AH Parcel to PWL by WHI will ultimately satisfy HCC § 11-5(a)(5). WHI understands that PML, who purchased the AH Parcel from PWL, is working towards developing affordable housing on the AH Parcel with a non-profit entity.

Second, there is nothing in the record indicating that the AH Parcel is not large enough to support 80 affordable housing units. Instead, the record reflects that the AH Agreement specifically contemplated that "11.8+/- acres of land" were to be conveyed in satisfaction of D&O Condition No. 9, and Exhibit D to the AH Agreement showed the specific portion of the Petition Area that was to be subdivided to create the AH Parcel. The County has never claimed

to not have known WHI's affordable housing obligations at the time the AH Agreement was executed or otherwise provided justification for its sudden change in position that the AH Parcel is not large enough to satisfy WHI's affordable housing obligations. Instead, the record is clear that the County knew of and ***approved*** the size and shape of the AH Parcel before it was subdivided from the Petition Area and conveyed to PWL.

The record also reflects that PML has submitted a HRS Chapter 201H application to the County for a mixed-use development that is to include 32 affordable housing units, a True Value hardware store, and potentially other commercial uses. WHI's project manager, Joel LaPinta, provided the following testimony to the Commission regarding WHI's recent meeting with OHCD:

> Basically the substance was that they had been -- that the owner of Pua Melia ***did not have enough space to put his True Value Hardware store and commercial use, plus 80 affordable apartments unless they go high, like three stories***, and do stacked plats, ***and they prefer not to do that.***
>
> ***They prefer to do a two-story town home design. So the footprint would be much larger than the parcel would allow.***

Exhibit 45 at 106:16-24 (emphases added).

WHI has absolutely no control over the design, density, or non-affordable housing components of PML's proposed project; those are matters to be determined between the County and PML under the HRS Chapter 201H process. Presumably, the preference of two-story townhomes and inclusion of a hardware store reduces both the unit density and amount of the AH Parcel available for developing more affordable housing units. It is unclear how the County could suddenly claim that WHI has not satisfied its affordable housing obligations due to insufficient land for the required number of units when it is the County who must approve the

number of units and non-affordable housing/commercial uses for PML's project on the AH Parcel under the HRS Chapter 201H process.

Third, WHI had no involvement in, and in no way benefitted from, the sale of the AH Parcel from PWL to PML. *See, e.g.*, Exhibit 23 at ¶9. As noted, WHI understands that the sale of the AH Parcel to PML was consummated with the County's approval. It is unclear how a transaction (in furtherance of affordable housing) that was approved by the County and that in no way provided a benefit to WHI, improper or otherwise, could be a basis for the County to question WHI's full satisfaction of D&O Condition No. 9 and Condition E of County Rezoning Ordinance No. 13-29 .

Fourth, the County has no legal or factual basis to object to the AH Parcel on the grounds that it has an unusual characteristic (a drainage easement) that purportedly makes it difficult to develop. HCC § 11-5(a)(5) requires that "[t]he land to be conveyed shall be ***acceptable to and approved by the OHCD*** . . . without unusual site conditions that make it difficult to build a home, to accommodate the number of homes the developer would be required to provide." (Emphasis added). Not only did former OHCD Housing Administrator Susan K. Akiyama sign the AH Agreement "recommend approval," but also current Housing Adminstrator Neil S. Gyotoku signed the AH Release "recommend approval" ***after*** the AH Parcel had been subdivided from the Petition Area and Conveyed to WML. *See* Exhibit 8; Exhibit 11. Clearly, the AH Parcel was deemed acceptable to and was approved by OHCD as required under HCC § 11-5(a)(5).

As discussed above, notwithstanding WHI's complete satisfaction of D&O Condition No. 9 and Condition E of County Rezoning Ordinance No. 13-29 , WHI is currently in discussions

with Ikaika Ohana, an IRS 501(c)(3) non-profit affordable housing developer, to voluntarily provide additional land to support affordable housing in Waikoloa. *See* Exhibit 59a; Exhibit 59b. A map showing the potential additional land to be provided by WHI is attached hereto as Exhibit 60. An immediate reversion would likely bring these discussions to a halt.

D. INTERNAL MANAGEMENT ISSUES ARE RELEVANT TO THE OSC

Fourth, Commissioner Okuda requested supplemental briefing on the following:

> And finally . . . Whether or not internal management issues of the petitioner is relevant to matters involving this proceeding.

Exhibit 45 at 103:24-104:-3.

Under the Hawai'i Rules of Evidence ("**HRE**") Rule 401, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." HRE 401. "[R]elevancy is not 'dependent upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact.'" *Kaeo v. Davis*, 68 Haw. 447, 452, 719 P.2d 387, 390 (1986) (citation omitted). "The rules of evidence governing administrative hearings are much less formal than those governing judicial proceedings." *Loui v. Board of Med. Examiners*, 78 Hawai`i 21, 31, 889 P.2d 705, 715 (1995) (citations omitted).

As also discussed, the contours of "good cause" are not defined by statute, rule or case law in the present context. Instead, a finding of good cause is a discretionary determination to be made by the Commission based upon the facts and circumstances of the case being presented. *See Doe*, 98 Hawai'i at 154, 44 P.3d at 1095; HRS § 205-4(g). "Good cause" is a "substantial reason" to excuse a legal obligation, and a finding of good cause is within the Commission's discretion. *See Doe*, 98 Hawai'i at 154, 44 P.3d at 1095.

In the Halekua Docket, the Commission previously found the existence of good cause to dismiss an OSC based upon very similar actions to those taken by WHI to advance the development of the Project since the OSC was issued, including securing financing, hiring a Hawai'i-based third-party project manager, and dedicating land in satisfaction of obligations under the D&O. *See* Sections II.B.4 and III.B, *supra.* The project at issue in Halekua was delayed due to the petitioner's filing of bankruptcy (whereas, here, the Project was delayed due the actions of Mr. Martirosian).

As applied to the facts of this case, in ***addition*** to the actions taken by WHI that very closely parallel those that established good cause in the Halekua Docket, the Commission need only find that Mr. Martirosian's numerous misdeeds were a "substantial reason" for WHI failing to complete the Project and to maintain the Petition Area's present SLU Rural District classification, which the Commission has clear discretion to do. *See* HRS § 205-4(g). Therefore, whether Mr. Martirosian's misdeeds provide a "substantial reason" is a "fact that is of consequence" in determining whether WHI has demonstrated good cause. *See* HRE 401. Any evidence demonstrating Mr. Martirosian's misdeeds makes the existence good cause "more probable . . . than it would be without the evidence." *See id.*

WHI's allegations against Mr. Martirosian have been supported through numerous exhibits, sworn declarations, and sworn oral testimony. *See, e.g.*, Exhibit 2; Batichtcheva Decl, dated Jul. 24, 2018, at ¶¶2-4; Exhibit 26; Exhibit 55 at 33:16-35:16; **Exhibit 61** (Written Direct Testimony of Valery Grigoryants, dated Nov. 16, 2018) at 2:10-4:8, attached hereto. Absolutely nothing ***in the record*** contradicts these allegations or calls into question the credibility of WHI's witnesses, or otherwise gives the Commission reason to question the veracity of their statements and representations. This includes the numerous articles published by Environment Hawai'i,

which no doubt tainted the Commission's perception of WHI and consideration of the OSC before these proceedings even began.[15]

At the Commission's October 24, 2018 hearing on the OSC, WHI called as one of its witnesses Valeriy[16] Grigoryants, the Vice President of Arch, Ltd. ("**Arch**"), the grandparent company of WHI. Valeriy Grigoryants provided credible, uncontroverted testimony on a number of issues germane to the Commission's consideration of the OSC and determination of whether good cause exists.

Valeriy Grigoryants explained how Mr. Martirosian was ultimately put in charge of WML and WHI, and why WHI's principals put so much trust into Mr. Martirosian:

> Q: The issue of the owner's trust in Mr. Martirosian has come up from the Commissioners, and the natural question is, why did you trust him?
>
> A It's a long story, but I will try to be short.
>
> Well, we -- in America we are called Russians, but we are not Russians we are Armenians. We attend not Russian church but Armenian church.
>
> So we had a goal to differentiate, diversify risks in business, like if you know, there is a huge Armenian community in Los Angeles. And this is how it happens in life, Jewish people help Jewish people; Armenian people help Armenian people and look for connections. That's how I met Stefan Martirosian.
>
> It was at end of the '90's, beginning of 2000. He seemed to me and my brother as a very intelligent, smart man. But we didn't let him

[15] WHI believes that the Commissioners received a copy of the first Environment Hawai'i article on the Project as part of its Staff Report for the initial Status Hearing on this matter. If that is true, then WHI has been denied its constitutional right to due process. These articles were not admitted into the record (through taking administrative notice) until ***after*** the Status Hearing was held and the OSC was issued.

[16] As a consequence of translating from Russian to English and vice versa, Valeriy Grigoryants first name is at times also spelled Valery. In addition, the sequencing of names in Russia is different than the United States. In Russia, generally the order is as follows: last name, first name, middle name. Thus, for example, Aykaz Vardgesovich Ovasafyan (English sequencing) is at times written out as Ovasafyan Aykaz Vardgesovich (Russian sequencing).

to come too close to us, but he wanted. After all he reassured us to start to do some small investments in the United States. That's what we did.

And over time we developed a trustful relationship, I would say, like brothers relationship.

Our relationship became so close that when his mother passed away, we came to the funeral, flying 13 hours. And when my mother passed away, he flew all the way from Los Angeles to Moscow to funeral. That's it.

Exhibit 55 at 30:24-31-24 (emphasis added).

Valeriy Grigoryants also provided some examples of Mr. Martirosian's mismanagement and breaches of his fiduciary duties to WML and WHI:

Q: Thank you for your testimony.

I was wondering, were you involved in the original boundary amendment, the reclassification for the project back in 2008?

A: No, the staff of Martirosian was involved.

Q: So were you aware of the proposed project for Waikoloa Mauka?

A: ***I didn't know the details on the project and that was one of the problems with him, that he never informed us, never told us details.***

. . .

Q: So when did you become aware of the boundary amendment and the proposed project for the area?

A: I found out about that at the end of 2017, but that was too late to do anything. So the only thing I could do was to transfer 11,000 acres for affordable housing -- sorry, 11.7 acres for affordable housing.

Id. at 39:6-15, 39:22-40:4; *see also* WHI's Statement of Position on Order to Show Cause, filed August 8, 2018, at 8-11.

As the Hawai'i Supreme Court has explained, "an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have." *Property House, Inc. v. Kelley*, 68 Haw. 371, 377, 715 P.2d 805 (1986). Mr. Martirosian's complete failure to keep WML's and WHI's principals fully informed is significant to the Commission's determination of good cause: "An agent's fiduciary duty which carries with it the ***duty of full, fair, complete, and timely disclosure of material facts, is among the most important obligations in our legal system***." *Han v. Yang*, 84 Hawai'i 162, 173, 931 P.2d 604, 615 (App. 1997) (emphases added).

Valeriy Grigoryants also explained some of Mr. Martirosian's fraudulent activities related to WHI's affiliates, and that these affiliates have taken criminal and civil action against Mr. Martirosian. *See* Exhibit 55 at 33:16-35:16. WHI has previously submitted documentary evidence to substantiate these claims. *See, e.g.*, Exhibit 2 (Statement in Relation of Legal Steps Undertaken Against Stefan Martirosian); Exhibit 26 (Translated Extradition Documents); *cf. also* Exhibit 61 at 2-4. These criminal and civil fraud allegations against Mr. Martirosian are relevant to the Commission's determination of good cause, as Mr. Martirosian's lack of trustworthiness as an officer of WML and WHI is a "fact that is of consequence." Evidence showing that Mr. Martirosian defrauded WHI's affiliates and principals goes directly to his trustworthiness. *See* HRE 401.

Valeriy Grigoryants provided further credible testimony to address the Commission's continued concerns that Mr. Martirosian was somehow still involved with the Project, WHI, and/or its affiliates:

> Q: At the last hearing, the Commission was concerned that somehow Mr. Martirosian was somehow still involved with the Waikoloa Highlands project.

A: ***No, he is not involved in with company.***

Exhibit 55 at 33:16-19 (emphasis added).

Valeriy Grigoryants also confirmed that Mr. Martirosian does not now hold and never has held any ownership interest in WML, WHI, or any of their affiliates, and that he no longer holds any management positions:

> Q: Does Mr. Martirosian today have any shareholder interest or other management control of any of the Waikoloa companies?
>
> A: I would like to confirm with members of the committee, just because there were so many gossips and speculations before. ***I would like to let you know that Mr. Martirosian was never owner of the company or any other companies I'm involved in United States as well as abroad.***
>
> ***He was just a hired manager. He was not and is not the owner of the companies. And now he's fired from all the positions.***

Id. at 29:13-24 (emphasis added). Further discussion addressing the Commission's concerns over whether Mr. Martirosian ever held an ownership interest in WHI or its affiliates is discussed in Section III.G, *infra*, addressing Commissioner Cabral's request for clarification on certain exhibits related to WHI's corporate structure and decision-makers.

For these reasons ***and*** the significant steps WHI has taken to get the Project back on track,[17] WHI respectfully submits that good cause exists to excuse its failure to timely develop the Project and to maintain the Petition Area's SLU Rural District classification (in the event that

[17] As discussed *supra*, WHI has presented evidence and testimony that it has taken steps almost identical to those taken by Halekua to demonstrate good cause and assure the Commission that it is willing and able to proceed with the Project. WHI has secured financing for the Project, has hired a third-party project manager (whom the Commission recognized as an expert in real estate development and sales), and conveyed 11.7-acres of land in satisfaction of its affordable housing obligations under D&O Condition No. 9. In addition, similar to the delay caused in Halekua as a result of its bankruptcy, WHI has submitted substantial evidence and elicited credible testimony that Mr. Martirosian's numerous bad acts resulted in the delay of the Project being timely developed. The parallels are undeniable.

the Commission determines that WHI has not substantially commenced its use of the land). A reversion should not be ordered.

E. COUNTY ENTITLEMENTS REQUIRED WITH AND WITHOUT A REVERSION

As rephrased by Chair Scheuer, Commissioner Ohigashi requested supplemental briefing on the following issue:

> [W]hat statutes and ordinance guide -- at times will guide the process going forward if reversion occurs; and if reversion does not occur, all moving towards a project going forward that would be substantially similar to the one before us now.

Exhibit 45 at 105:24-106:3.

1. If the Commission Does Not Order a Reversion, WHI Will Need to Amend the Rezoning Ordinance for the Petition Area

If the Commission does not order a reversion and maintains the Petition Area's SLU Rural District classification, WHI will need to obtain an amendment of County Rezoning Ordinance No. 13-29, which required WHI to obtain final subdivision approval for the first 50 lots in the Project by March 13, 2018. *See* Exhibit 4 (County Rezoning Ordinance No. 13-29, dated March 13, 2013) at 2, § B. Therefore, WHI must amend Rezoning Ordinance No. 13-29 to allow additional time to complete the subdivision of the Project, as well as other potential amendments.

The County Code provides that all zoning regulations shall be enacted by the County Council as ordinances. HCC §2-33(a) ("The regulations shall be enacted as ordinances of the County and published as provided by law."). Any proposed zoning ordinance requires review and at least one hearing by one of the County's two Planning Commissions. *See id.* ("Pursuant

to the Charter, the windward and leeward planning commissions shall meet separately and provide separate recommendations on any amendment to zoning regulations.").

The process for approving ordinances is prescribed by the Hawai'i County Charter (the "**County Charter**") as follows:

> **Ordinances**. (a) Ordinances shall be initiated as bills which shall be passed only after two readings on separate days. Reading of bills may be by title only. Full readings and public hearings may be required by a one-third vote of the entire membership.
>
> . . .
>
> (f) Ordinances shall become effective upon approval by the mayor or at such later date as may be specified therein.

Cnty. Charter § 3-10.

The Mayor can veto any rezoning ordinance, and the Council can override the Mayor's veto by a vote of not less than two-thirds of the Council. *See* Cnty. Charter § 3-12. The Mayor can also elect to not to sign an ordinance, in which case it becomes law within ten days (excluding Saturdays, Sundays and holidays) after it has been submitted to the Mayor. *See id.*

At the Commission's September 6, 2018 hearing on WHI's Motion to Continue Hearing on Order to Show Cause, filed July 25, 2018, WHI represented to the Commission that obtaining an amendment to Rezoning Ordinance No. 13-29 would take approximately ten-to-twelve months. *See* Exhibit 19 at 42:2-4. In response, the County confirmed that it would "take a number of months, possibly up to a year," to process a new zoning ordinance for the Petition Area. *See id.* at 56:17-19. Consistent with these estimates, County Planner Jeff Darrow testified at the Commission's October 25, 2018 hearing that a new rezoning ordinance for the Petition Area could take "[b]etween six months and a year." *See* Exhibit 45 at 89:12-16.

2. If the Commission Orders a Reversion, WHI Will Need to First Process an Amendment to the County's General Plan and then a New Rezoning Ordinance for the Petition Area

If the Commission orders a reversion from the SLU Rural District to the SLU Agricultural District, WHI would need to process an amendment to the County General plan to designate the Petition Area "Extensive Agriculture," and then a new rezoning ordinance. A new rezoning ordinance would be processed under the same steps sets forth above; however, it would have to rezone the Petition Area from its current RA-1a designation to the FA-1a or other similar agricultural zoning designation.

Amendments to the County General Plan can be made in one of two ways, either through an interim amendment (*i.e.*, by a single landowner or for a specific parcel of land) or through the County's comprehensive review process that is supposed to occur every ten years. As discussed *supra*, the County is currently in the process of its comprehensive ten-year review and update of the General Plan. *See* Exhibit 45 at 24:17-25:2. During this time, no individual amendments to the General Plan can be processed by the County Council, Planning Director, or the general public. *See* Cnty. General Plan (Ord. No. 07-07 & 09-191) §§ 16.2(1)(a), 16.2(2)(a), 16.2(3)(a); Exhibit 45 at 90:7-11.

According to Mr. Darrow, an applicant who wishes to make an amendment to the General Plan during the comprehensive review period can work with the Planning Department to be considered for inclusion in the Planning Department's comprehensive review and update. *See* Exhibit 45 at 39:1-11; *id.* at 68:14-20. Therefore, a General Plan Amendment for the Petition Area could only be processed in the near future through the County's comprehensive review.

The procedures for processing a General Plan Amendment are set forth in Rule 4 of the Planning Department Rules of Practice and Procedure ("**PD Rules**"). Pursuant to the PD Rules, the Planning Director initiates a comprehensive review of the General Plan and prepares a set of recommended amendments for independent review by the Windward and Leeward Planning Commissions, and then adoption by the County Council. *See* Cnty. General Plan GP § 16.1. The Planning Director is required by County law to initiate a comprehensive review every ten years. *See* PD Rules § 4-3(a) ("Within forty-five days of a ten-year lapse from the date of adoption of the General Plan, the Planning Director shall upon notification to the County Council, initiate the comprehensive review of the General Plan."). The last comprehensive review of the General Plan was completed in 2005.

The ongoing comprehensive review and update of the General Plan is a long process that may take years to complete. Mr. Darrow testified that the current comprehensive review could take in ***excess of three years to complete***. *See* Exhibit 45 at 88:7-13. However, processing a General Plan Amendment for the Petition Area could take even longer in the event that WHI's could not be included as a part of the County's comprehensive review.

Only once the County's comprehensive review is complete could WHI then proceed to rezone the Petition Area to an appropriate agricultural district, which could take up to a year or longer. *See* Exhibit 45 at 34:15-19. Therefore, based upon the testimony that has been provided and the authorities discussed above, processing a General Plan Amendment and a new rezoning ordinance for the Petition Area would likely take ***in excess of four years*** if the Commission orders a reversion.

F. AINA LE'A APPLIES NOTWITHSTANDING D&O CONDITION NOS. 2 & 3

Commissioner Chang requested supplemental briefing as follows:

> [W]hether Bridge Aina Lea even applies to this Decision and Order, because a decision and order specifically defines what is the specific requirement of a build-out, and the build-out means the backbone infrastructure to allow for the sale of individual lots.
>
> . . .
>
> So I would like briefing on whether Bridge Aina Lea is even applicable to this case, given Condition 2 and 3 . . . .
>
> If it is not applicable, then I would like briefing on what is the standard that is applicable for this particular Decision and Order and this Order to Show Cause, because in my view it is very different.

Exhibit 45 at 107:7-108:3.

D&O Conditions Nos. 2 and 3 respectively provide as follows:

> 2. Completion of Project. Petitioner shall develop the Petition Area and complete buildout of the Project no later than ten (10) years from the date of the Commission's decision and order. ***For purposes of the Commission's decision and order, "build out" means completion of the backbone infrastructure to allow for the sale of individual lots***.
>
> 3. Reversion on Failure to Complete Project. ***If Petitioner fails to complete buildout of the Project or secure a bond for the completion thereof within ten (10) years from the date of the Commission's decision and order, the Commission may***, on its own motion or at the request of any party or interested person, ***file an Order to Show Cause*** and require Petitioner to appear before the Commission to explain why the Petition Area should not revert to its previous Agricultural classification.

See D&O at 37 (Emphasis added).

The import of Commissioner Chang's question is unclear, which is yet further evidence of the perilous uncertainty faced by the Commission and WHI in these OSC proceedings. It is also unclear how the Commission could be in the process of promulgating a rule that includes a

definition of "substantial commencement" that is intended "[t]o conform with [the Hawai'i] Supreme Court decision in *Bridge 'Aina Le'a*" and would apply to ***all*** OSC proceedings, yet is simultaneously questioning whether *Aina Le'a* applies to these OSC proceedings. *See* Exhibit 46; Exhibit 47.

However, for purposes of addressing this question, WHI respectfully assumes Commissioner Chang meant that since D&O Condition No. 2 defines "build out" and Condition No. 3 allows the Commission to issue an OSC if "build out" is not completed within 10 years, then the Commission need not apply the substantial commencement framework set forth in *Aina Le'a*. In essence, this would replace the threshold "substantial commencement" test with a full "build out" test. Such a test would violate both the plain language of HRS § 205-4(g) and the Hawai'i Supreme Court's clear instructions in *Aina Le'a*.

First, the Commission's authority to order a reversion is derived solely from HRS § 205-4(g). The operative portion of HRS § 205-4(g) provides that:

> The commission may ***provide by condition that absent substantial commencement of use of the land*** in accordance with such representations, ***the commission shall issue . . . an order to show cause why the property should not revert*** to its former land use classification or be changed to a more appropriate classification.

(Emphases added). The Commission has no authority to issue an OSC or order a reversion separate and apart from the authority granted under HRS § 205-4(g), and the absence of substantial commencement is a necessary precondition to requiring a showing of good cause.[18]

[18] Therefore, to the extent that HAR § 15-15-93(b) does not expressly require finding the absence of substantial commencement before the Commission can require a showing of good cause, HAR § 15-15-93(b) exceeds the Commission's authority and any condition imposed thereunder (without the express requirement of substantial commencement) is void. *See Asato v. Procurement Policy Bd.*, 132 Hawai`i 333, 346, 322 P.3d 228, 241 (2014) ("[A] public administrative agency possesses only such rulemaking authority as is delegated to it by a state

To the extent that D&O Condition No. 3 is being construed to mean that, if full build out is not timely achieved, the Commission can require WHI to show good cause without first addressing the threshold question of "substantial commencement," Condition No. 3 exceeds the Commission's authority under HRS § 205-4(g). Under this interpretation, Condition No. 3 replaces "substantial commencement" with "complete build out of the Project." *Compare* HRS § 205-4(g) *with* D&O Condition No. 3. However, these are two distinct concepts.

The concept of "substantial commencement" clearly contemplates something less than "full build out." Any interpretation to the contrary would gut the clear limitations the legislature placed upon the Commission's authority to order a reversion (*i.e.* requiring a lack of "substantial commencement"). Indeed, "[HRS §] 205–4(g) represents a ***limited exception*** to the general principles set forth in HRS Chapter 205" and, more specifically, the "procedures set forth in HRS § 205–4 that are generally applicable when boundaries are changed." *Aina Le'a*, 134 Hawai'i at 212-13, 339 P.3d at 710-11. As the court observed in *Aina Le'a*, "[i]n drafting HRS § 205–4(g), the legislature did ***not*** require that the use be ***substantially completed***, but ***rather*** that it be ***substantially commenced***." *Aina Le'a*, 134 Hawai'i at 214, 339 P.3d at 712 (emphasis added).

Second, in *Aina Le'a*, the court set forth the mandatory framework for applying HRS § 205-4(g) and resolving an OSC. This framework is unquestionably applicable to this case notwithstanding D&O Conditions Nos. 2 and 3. Nothing in the court's opinion limits its interpretation of HRS § 205-4(g) to the conditions imposed by the Commission in the *Aina Le'a* docket.

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legislature and may only exercise this power within the framework of the statute under which it is conferred." (emphases added)).

Instead, the court explained that the ***threshold*** question for determining what procedures the Commission must follow when ruling on any OSC is whether the petitioner has "substantially commenced its use of the land:

> The ***proper procedure to be followed by the LUC in ruling on the OSC therefore depends on whether the petitioner has substantially commenced use of the land*** in accordance with its representations.

Aina Le'a, 134 Hawai'i at 212, 339 P.3d at 710 (emphasis added).

If a petitioner has substantially commenced its use of the land, the Commission must follow the same procedures it ordinarily follows under HRS § 205-4 for all district boundary amendments:

> [*W*]***here the petitioner has substantially commenced use of the land, the LUC is required to follow the procedures set forth in HRS § 205–4 that are generally applicable when boundaries are changed***. The LUC is therefore required to find by a clear preponderance of the evidence that the reclassification is reasonable, not violative of HRS § 205–2, and consistent with the policies of HRS §§ 205–16 and 205–17. HRS § 205–4(h). The LUC is also required to obtain six votes in favor of the reclassification. HRS § 205–4(h). Finally, the LUC must resolve the reversion or reclassification issue within three hundred sixty-five days. HRS § 205–4(g).

Id. at 213, 339 P.3d 711; *see also id.*, 339 P.3d at 711 ("[I]f the LUC seeks to revert land after the petitioner has substantially commenced use of the land, the LUC is required to follow the procedures set forth in HRS § 205–4.").

If, on the other hand, the Commission does not find substantial commencement, it does not need to follow its ordinary process for district boundary amendments:

> Section 205–4(g) represents a ***limited exception*** to the general principles set forth in HRS Chapter 205, which require consideration of whether the boundary change violates HRS §

> 205–2 (setting forth general considerations in districting and classifying land), is consistent with the policies and criteria set forth in HRS § 205–16 (compliance with the Hawai'i state plan) and HRS § 205–17 (setting forth decision-making criteria for the LUC).
>
> ***Where the LUC issues an OSC and seeks to revert property based on a petitioner's failure to substantially commence use of the land in accordance with its representations, the LUC is not required to follow the procedures otherwise applicable to boundary changes under HRS Chapter 205.***

Id. at 212, 339 P.3d at 710 (emphasis added); *see also id.* at 213, 339 P.3d at 711 ("[I]f the petitioner has not substantially commenced use of the property, then the LUC may revert the property without following the strictures of HRS § 205–4, so long as it otherwise complies with HAR § 15–15–93.").

After setting forth this framework, the court proceeded to analyze whether the developers had substantially commenced their use of the land and, therefore, determine what procedures the Commission was required to have followed. Noting the absence of both a statutory definition of "substantial commencement" and an expression of Commission's interpretation of "substantial commencement," the court held that "a determination of whether a party has substantially commenced use of the land will ***turn on the circumstances of each case, not on a dollar amount or percentage of work completed***." *Id.* at 214, 339 P.3d at 712 (emphasis added).

As discussed above, based upon the unique entitlements history for the Project, the fact that the Project could be completed in the very near future, and the concrete steps WHI has taken to advance the Project, including the irrevocable conveyance of the AH Parcel at no cost, WHI has substantially commenced its use of the land and a reversion should not be ordered. Any interpretation of D&O Conditions Nos. 2 and 3 that would replace the threshold "substantial commencement" test with a full "build out" test would be directly contrary to the express

language of HRS § 205-4(g).

G. OUTSTANDING QUESTIONS REGARDING WHI'S CORPORATE STRUCTURE, THE PAST AND PRESENT SHAREHOLDERS OF WHI AND ITS AFFILIATES, AND WHI'S FINANCING COMMITMENT

At the October 25, 2018 hearing, Chair Scheuer and Vice Chair Cabral requested further clarification several of WHI's exhibits as follows:

> Vice Chair Cabral: In addition to all of the other homework assignments, I would really like to ask the Petitioner if we could get a clarification of the items that are different from what was previously presented to use in writing.
>
> . . .
>
> Chair Scheuer: Mr. Lim, there were questions that came up in the examination of [Valeriy] Grigoryants about the accuracy of Exhibit 5, as well as the accuracy of the exhibit which showed the corporate structures.

Exhibit 45 at 116:8-23. In addition, questions arose as to the legitimacy of the financing commitment WHI has secured from ABB and whether those funds have been secured for the specific purpose of developing the Project on the Petition Area. These issues are each discussed in turn.

1. Exhibit 28 – WHI's Corporate Structure

At the October 24, 2018 hearing, the Commission raised concerns regarding the accurateness of Exhibit 28 (Corporate Structure Organizational Chart), whether Valeriy Grigoryants, who provided oral testimony, has authority to make binding decisions for WHI and the extent of Natalia's Barichtcheva involvement in the Project during Mr. Martirosian's tenure.[19] The following sets forth in detail: (1) the entire corporate structure of WHI, including

[19] *See* Exhibit 55 at 47:23-24 ("I'm just trying to determine the accuracy of Exhibit 28[.]"); *id.* at 48:8-9 ("And is all the information in Exhibit 28 a 100 percent correct?"); *id.* at 70:1-5 ("Does [Exhibit 33] referenced just now naming Mr. Valeriy Grigoryants] as the vice president [of Arch] clarify that he has the legal authority to bind Waikoloa

the officers and shareholders of its affiliated entities; (2) Valeriy Grigoryants' authority to make binding decisions for WHI; and (3) Mr. Ovasafyan's and Ms. Batichtcheva's respective roles.

Table 1, below, provides a summary of the complete corporate structure of WHI and its affiliates, including all directors and shareholders:

Table 1[20]

Company	Shareholder(s)	Director(s)	Other
WHI (Hawaii Corporation)	Vitoil (100%)	Ms. Batichtcheva	President: Ms. Batichtcheva
Vitoil Corporation (California Corporation)	Arch (100%)	Ms. Batichtcheva	
Arch, Ltd. (Bahamas Corporation)	Davies Partners Limited (100%)	Aykaz Ovasafyan and Roberto Rodriguez Bernal	President: Vitaly Grigoryants Vice-President: Valeriy Grigoryants
Davies Partners Limited (B.V.I Corporation)	Vitaly Grigoryants (100%)	Aykaz Ovasafyan and Roberto Rodriguez Bernal	Valeriy and Vitaly Grigoryants have equal decision-making authority for all the subsidiaries of Davies Partners Limited, including WHI, Vitoil, and Arch.

Highlands, Inc., in any commitment made to this Commission?"). The Commission further questioned who Aykaz Ovasafyan is and whether Natalia Batichtcheva was involved with the Project during the time Mr. Martirosian was in charge of the Project. *See id.* at 66:15-17 ("Can you explain who Mr. Ovasafyan [is]."); *id.* at 62:5-5 ("So [Ms. Batichtcheva] wasn't involved during Martirosian time?"); *id.* at 62:10-13 ("So what was [Ms. Batichtcheva's] role exactly besides financial? Does she report to Mr. Martirosian or she report to Mr. -- to the owners?").

[20] Sanction searches have been performed on all the individuals and corporations involved with the Project, including but not limited to, Stefan Martirosian, Vitaly Grigoryants, Valery Grigoryants, Aykaz Ovasafyan, Roberto Rodriguez Bernal, and Natalia Batichtcheva, WHI, WMA, Vitoil, Arch, and Davies. The searches were conducted through the federal database operated by the Office of Foreign Assets Control of the US Department of the Treasury and the European Commission's Service for Foreign Policy sanctions list. The results of those searches indicated that no sanctions have been imposed on any of the foregoing individuals and corporations.

WHI is wholly owned by Vitoil Corporation ("**Vitoil**"). *See* Exhibit 27 (Resolution of Board of Directors of Arch Authorizing Stock Transfer); Exhibit 28. Vitoil is organized under the laws of California and its sole director is Ms. Natalia Batichtcheva.[21] Ms. Batichtcheva also serves as the secretary and chief financial officer of Vitoil. *See* Exhibit 31.

Arch is the parent company of Vitoil (and, thus, the grandparent company of WHI). Arch is organized under the laws of Bahamas and its current directors are Aykaz Ovasafyan and Roberto Rodriguez Bernal. *See* Exhibit 34 (Arch's Certificate of Incumbency). Valeriy Grigoryants is the vice president of Arch, and Vitaly Grigoryants is the president of Arch. *See* Exhibit 28 (Corporate Structure Organizational Chart); Exhibit 33 (Arch's Letter of Authorization); Exhibit 34 (Arch's Certificate of Incumbency); Exhibit 61 at 1:6-14.

Arch is currently owned by Davies Partners Limited ("**Davies**"). Davies is organized under the laws of the British Virgin Islands and its current directors are Mr. Ovasafyan and Mr. Bernal. *See* Exhibit 61 at 2:15-20. Davies was formed for tax purposes and holds all of Arch's shares. *See* Exhibit 61 at 2:9-20; Exhibit 28.

Vitaly Grigoryants, Valeriy Grigoryants's brother, is effectively the sole shareholder of Davies and the ultimate beneficial owner of the entire corporate structure of WHI. *See* Exhibit 28; Exhibit 61 at 1:11-17. Vitaly Grigoryants and Mr. Ovasafyan have entered into a Trust Agreement, pursuant to which Mr. Ovasafyan owns a nominal amount of shares in Davies for the benefit of Vitaly Grigoryants. *See* **Exhibit 62** (Letter of Certification, dated Nov. 8, 2018), attached hereto; Exhibit 61 at 2:10-14. Although Valeriy Grigoryants represented at the October 24, 2018 hearing that WHI could provide the Commission with a copy of the Trust Agreement,

[21] Ms. Batichtcheva also serves as the secretary, chief financial officer, and director of Vitoil. See Exhibit 31 (Vitoil Shareholders' Resolution, dated June 19, 2017).

due to confidentiality obligations under the Trust Agreement, WHI is not able to publicly disclose it to the Commission.

While Vitaly Grigoryants is the ultimate shareholder of WHI's corporate structure, Valeriy and Vitaly Grigoryants have equal rights to make decisions for the various corporations, including WHI. *See* **Exhibit 63a** (Letter of Certification, dated Nov. 8, 2018) & **Exhibit 63b** (Letter of Authorization, dated October 4, 2018), attached hereto; Exhibit 61 at 1:11-26; Exhibit 33. Hence, both Valeriy and Vitaly Grigoryants are ultimate decision-makers on all issues regarding WHI, Vitoil, and Arch, including all matters relating to the Project and the Petition Area. *See id.* Further, Vitaly Grigoryants has authorized Valeriy Grigoryants with full authority to act and represent Arch, Vitoil, and WHI in the proceedings regarding the Petition Area before the Commission as well as with the County. *See* Exhibit 62; Exhibit 63b; *see also* Exhibit 61 at 1:24-26. Valeriy Grigoryants has been the decision-maker of WHI, together with his brother Vitaly Grigoryants, since it was incorporated in 2015. Exhibit 61 at 2:1-3. Thus, based on the foregoing, Valeriy Grigoryants is authorized to make binding representations and decisions regarding WHI, the Petition Area, and the Project.

Mr. Martirosian was the director of WML from approximately 2005 to 2017 and the director of WHI from January 1, 2015 until May 9, 2016. *See* Exhibit 30; Exhibit 5; **Exhibit 64** at 1:8-11 (Written Direct Testimony of Natalia Batichtcheva, dated Nov. 16, 2018), attached hereto. Ms. Batichtcheva has served as WHI's secretary, chief financial officer, and director since being appointed to these positions on May 9, 2016. *See* Exhibit 5. Ms. Batichtcheva did work for WML and WHI during the time Mr. Martirosian was in charge of the Project; however, her role was limited to maintaining day-to-day accounting procedures, other general accounting

and bookkeeping functions, and other administrative duties and responsibilities.[22] *See* Exhibit 64 at 1:16-18. Ms. Batichtcheva did not participate in the decision-making of WML and WHI during Mr. Martirosian's tenure. Ms. Batichtcheva was not aware of Mr. Martirosian's mismanagement until the summer of 2017. *See id.* at 1:18-19 and 2:1-3. Mr. Martirosian solely managed the Project during his tenure with WML and WHI without any informed involvement by Ms. Batichtcheva, Vitaly Grigoryants, or Valeriy Grigoryants. *See id.*; Exhibit 61 at 3:16-27.

2. Exhibit 5 and Ownership Interests in WHI and Its Affiliates

At the October 24, 2018 hearing, Chair Scheuer expressed concern about Exhibit 5 and focused on whether Mr. Martirosian ever owned an interest in Vitoil, the sole shareholder and parent company of WHI.[23]

As previously represented to the Commission, Mr. Martirosian did not previously and does not currently have an ownership interest in WHI or its affiliates, including Vitoil. *See* Exhibit 61 at 2:24-28; Exhibit 55 at 29:13-24; Exhibit 29. Further, Mr. Martirosian has never been a shareholder of WHI, Vitoil, or Arch, or any company associated with WHI. *See* Exhibit 61 at 2:24-28. Mr. Martirosian signed the Exhibit 5 as a ***representative*** of Vitoil just like Mr. Ovasafyan signed the same resolution as a representative of Arch. *See id.* at 3:1-15; *see also* Exhibit 33; Exhibit 34. At the time Exhibit 5 was signed, Mr. Martirosian was still the director of Vitoil. *See* Exhibit 31; Exhibit 32.

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[22] *See* Exhibit 64 at 1:19-24 ("I was under the impression that, he had the authority from Valeriy and Vitaly Grigoryants to make all the decisions regarding the Project. However, he never had such authority.").

[23] *See* Exhibit 55 at 67:22-24 ("On that Exhibit 5, I read Exhibit 5 as listing Stefan Martirosian as owning 20 percent of the property through Vitoil; is that incorrect?"); *id.* at 68:5-7 ("And does Mr. Martirosian have any interest in Vitoil? Any ownership?").

Under both signature lines of Exhibit 5, it states that Mr. Martirosian and Mr. Ovasafyan signed the resolution in their ***representative*** capacities. *See* Exhibit 5. At the time Exhibit 5 was executed, Arch had an 80% ownership interest and Vitoil had a 20% ownership interest in WHI; however, on December 28, 2017, Arch transferred the entirety of its ownership interest in WHI to Vitoil as a capital contribution, thereby making Vitoil WHI's sole shareholder. *See* Exhibit 27. Mr. Martirosian served as the Director of Vitoil until June 19, 2017, which was ***after*** Exhibit 5 was executed. *See* Exhibit 31; Exhibit 32.

3. WHI's Financing Commitment for the Project

The legitimacy of the $45,000,000 commitment made by Armbusinessbank CJSC ("**ABB**") to Arch for the specific purpose of developing the Project ("**Commitment Letter**") was also questioned by the Commission.[24] *See* Exhibit 20.

ABB is an Armenian bank established in 1991. ABB's sole shareholder is Vitaly Grigoryants. *See* Exhibit 55 at 75:11-13; Exhibit 61 at 4:27-5:4. ABB has been a member of the Yerevan Stock Exchange since 1994 and is currently a member of the MasterCard and Visa International payment systems. *See* Exhibit 61 at 4:22-26. ABB is also a member of the SWIFT s.c.r.l (Society for Worldwide Interbank Financial Telecommunication), an international banking program that entitles ABB to lend money internationally. *See id.* at 5:6-10.

Commissioner Okuda also questioned whether ABB has guaranteed to advance the funds to WHI for the specific purpose of developing the Project and whether the commitment made by

[24] *See* Exhibit 55 at 75:11-12 ("Armbusinessbank is also owned by your brother?"); *id.* at 75:14-17 ("So the commitment of additional funding is not from an outside entity who necessarily did their own diligence on this transaction, correct?").

ABB is irrevocable. Valeriy Grigoryants testified that the funds are available and guaranteed by ABB if the Commission gives WHI an opportunity to proceed with the Project.[25]

As set forth in the Commitment Letter, ABB has committed to lending $45,000,000 to Arch, and has consented to the transfer of those funds from Arch to WHI for the specific purpose of developing the Project. *See* Exhibit 20. Vitaly Grigoryants, as the President of Arch and the sole shareholder of ABB, has also guaranteed that up to $45,000,000 will be made available for the sole purpose of developing the Project. *See* Exhibit 57 (Letter of Confirmation from Vitaly Grigoryants, dated Nov. 9, 2018).

IV. CONCLUSION

In summary, WHI respectfully requests that the Commission prudently exercise its discretion and defer further proceedings under the OSC to allow WHI to process its County land-use entitlements under the terms of the Proposed Amendment, or other terms acceptable to the Commission. In the event that the Commission elects to proceed with the OSC to final action at this time, a reversion should not be ordered because WHI has substantially commenced its use of the land, and good cause exists to excuse WHI's failure to timely develop the Project and to maintain the Petition Area's SLU Rural District classification.

[25] *See* Exhibit 45 at 12:11-24 ("Q: [H]as the bank guaranteed under all circumstances that the $45 million will be available? A: Yes. The bank guarantees $45 million if Waikoloa will have opportunity to develop the project. Q: Is this an irrevocable commitment, meaning that the bank in writing has stated that it will not change its mind regarding this commitment? A: The bank will not change that their mind. And bank will make money available if Waikoloa Highlands will have opportunity to develop their project.").

DATED: Honolulu, Hawai'i, November 19, 2018.

STEVEN S.C. LIM
DEREK B. SIMON

Attorneys for
WAIKOLOA HIGHLANDS, INC.

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition Of WAIKOLOA MAUKA, LLC To Amend the Agricultural Land Use District Boundary Into the Rural Land Use District for Approximately 731.581 Acres in South Kohala District, Island of Hawai'i, Tax Map Key No. (3) 6-8-02:016 (por.)	DOCKET NO. A06-767 DECLARATION OF DEREK B. SIMON

DECLARATION OF DEREK B. SIMON

I, DEREK B. SIMON, declare and state as follows:

1. I am an attorney with Carlsmith Ball LLP, attorneys for Waikoloa Highlands, Inc. ("**WHI**"), successor-in-interest to Waikoloa Mauka, LLC, the original Petitioner in Docket No. A06-767.

2. Attached hereto as **Exhibit 45** is a true and correct copy of the transcript of State of Hawai'i Land Use Commission's ("**Commission**") October 25, 2018 hearing, prepared by Jean Marie McManus.

3. Attached hereto as **Exhibit 46** is true and correct copy of the Commission's 2018 Proposed Administrative Rule Amendments to Section 15-15, HAR, obtained from the Commission's website.

4. Attached hereto as **Exhibit 47** is a true and correct copy of the Commission's Revision to LUC's Proposed Amendments to Chapter 15-15, obtained from the Commission's website.

5. Attached hereto as **Exhibit 48a** through **Exhibit 48b** are true and correct copies of the following documents: Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment in Docket No. A05-755 (Hale Mua Properties, LLC), dated February 12, 2007 (Exhibit 48a); and the Commission's May 9, 2018 Meeting Minutes (Exhibit 48b), both obtained from the Commission's website.

6. Attached hereto as **Exhibit 49a** through **Exhibit 49b** are true and correct copies of the following documents: Findings of Fact, Conclusions of Law, and Decision and Order in Docket No. A92-680 (Brewer Properties, Inc.), dated January 7, 1993 (Exhibit 49a); and Order Granting Motion to Withdraw Land Use Approvals and Revert Land Use District Boundary Classification to Agricultural, filed September 20, 2000 in Docket No. A92-680 (Exhibit 49b), both obtained from the Commission's website.

7. Attached hereto as **Exhibit 50a** through **Exhibit 50c** are true and correct copies of the following documents: Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment in Docket No. A06-770 (The Shopoff Group, L.P.), filed October 21, 2008 (Exhibit 50a); Central Pacific Bank's 2013 Annual Report (Exhibit 50b); and the Commission's January 24, 2018 Meeting Minutes (Exhibit 50c), all obtained from the Commission's website.

8. Attached hereto as **Exhibit 51a** through **Exhibit 51f** are true and correct copies of the following documents: Amended Findings of Fact, Conclusions of Law, and Decision and Order in Docket No. A92-683 (Halekua Development Corporation ("**Halekua**")), dated October 1, 1996 (Exhibit 51a); Order Granting Office of Planning's Motion for an Order to Show Cause to Rescind the Decision and Order dated on October 1, 1996, dated February 20, 2003 (Exhibit 51b); Halekua-Kunia, LLC's 2016 Annual Report (Exhibit 51c); Halekua's 2007 Annual Report

(Exhibit 51d); Order Granting Halekua Development Corporation's Oral Motion to Dismiss Order to Show Cause Proceeding, dated March 16, 2007 (Exhibit 51e); and the Commission's January 9, 2003 Minutes of Meeting (Exhibit 51f), all obtained from the Commission's website.

9. Attached hereto as **Exhibit 52a** through **Exhibit 52f** are true and correct copies of the following documents: Findings of Fact, Conclusions of Law, and Decision and Order in Docket No. A94-706 (Ka'ono'ulu Ranch), dated February 10, 1995 (Exhibit 52a); Piilani Promenade South, LLC and Piilani Promenade North, LLC's (the "**Piilani Entities**") Motion to Stay Phase II of the Order to Show Cause Proceeding, filed April 8, 2013 (Exhibit 52b); the Piilani Entities' 2013 Annual Report (Exhibit 52c); the Commission's August 23, 2012 Meeting Minutes (Exhibit 52d); the Piilani Entities' Status Report, filed July 5, 2018 (Exhibit 52e); Findings of Facat, Conclusions of Law, and Decision and Order Denying the Acceptance of a Final Environmental Impact Statement, dated July 27, 2017 (Exhibit 52f); and the Piilani Entities' 2018 Annual Report regarding Docket No. A94-706 (Exhibit 52g), all obtained from the Commission's website.

10. Attached hereto as **Exhibit 53a** through **Exhibit 53d** are true and correct copies of the following documents: Findings of Fact, Conclusions of Law, and Decision and Order in Docket No. A10-788 (Hawai'i Housing Finance and Development Corporation ("**HHFDC**") and Forest City Hawai'i Kona, LLC ("**Forest City**"), adopted November 5, 2010 (Exhibit 53a); HHFDC's and Forest City's 2017 Annual Report (Exhibit 53b); the Commission's January 24, 2018 Meeting Minutes (Exhibit 53c); and the Commission's May 23, 2018 Meeting Minutes (Exhibit 53d), all obtained from the Commission's website.

11. Attached hereto as **Exhibit 54a** through **Exhibit 54d** are true and correct copies of the following documents: Findings of Fact, Conclusions of Law, and Decision and Order for

a State Land Use District Boundary Amendment in Docket No. A00-730 (Lanihau Properties, LLC ("**Lanihau**")), dated September 26, 2003 (Exhibit 54a); Lanihau's 2017 Annual Report (Exhibit 54b); the Commission's January 24, 2018 Meeting Minutes (Exhibit 54c); and the Commission's May 23, 2018 Meeting Minutes (Exhibit 54d), all obtained from the Commission's website.

12. Attached hereto as **Exhibit 55** is a true and correct copy of the transcript of the Commission's October 24, 2018 hearing, prepared by Jean Marie McManus.

13. Attached hereto as **Exhibit 56** is a true and correct copy of the Written Direct Testimony of Joel K. LaPinta, dated November 18, 2018, provided to Carlsmith Ball by Mr. LaPinta.

14. Attached hereto as **Exhibit 57** is a true and correct copy of a Letter of Confirmation signed by Vitaly S. Grigoryants, dated November 9, 2018, provided to Carlsmith Ball by WHI.

15. Attached hereto as **Exhibit 58** is a true and correct copy of a print out of the County of Hawai'i ("**County**") real property tax information for Tax Map Key No. (3) 6-8-002:057, obtained from the County Real Property Tax Office's website on November 18, 2018.

16. Attached hereto as **Exhibit 59a** is a true and correct copy of a letter dated November 16, 2018, from WHI to Ikaika Ohana, provided to Carlsmith Ball by WHI.

17. Attached hereto as **Exhibit 59b** is a true and correct copy of a letter from Ikaika Ohana to WHI, dated November 19, 2018, provided to Carlsmith Ball by WHI.

18. Attached hereto as **Exhibit 60** is a true and correct copy of a map showing a portion of TMK No. (3) 2-6-008:016 that has been identified in preliminary discussions between

WHI and Ikaika Ohana for affordable housing development, prepared by Riehm Owensby Planners Architects, LLC for WHI.

19. Attached hereto as **Exhibit 61** is a true and correct copy of the Written Direct Testimony of Valery Grigoryants, dated November 16, 2018, provided to Carlsmith Ball by WHI.

20. Attached hereto as **Exhibit 62** is a true and correct copy of a Letter of Certification signed by Aykaz Ovasafyan, dated November 8, 2018, provided to Carlsmith Ball by WHI.

21. Attached hereto as **Exhibit 63a** is a true and correct copy of a Letter of Certification signed by Vitaly Grigoryants and Valery Grigoryants, dated November 8, 2018, provided to Carlsmith Ball by WHI.

22. Attached hereto as **Exhibit 63b** is a true and correct copy of a Letter of Authorization signed by Aykaz Ovasafyan, dated October 4, 2018, provided to Carlsmith Ball by WHI.

23. Attached hereto as **Exhibit 64** is a true and correct copy of the Written Direct Testimony of Natalia Batichtcheva, dated November 16, 2018, provided to Carlsmith Ball by WHI.

I, DEREK B. SIMON, do declare under the penalties of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, November 19, 2018.

DEREK. B. SIMON